

Sardar Vs. State of Karnataka

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Court : Karnataka Kalaburagi

Decided On : Sep-03-2015

Judge : A.V.Chandrashekara

Appeal No. : CRL.A 579/2015

Appellant : Sardar

Respondent : State of Karnataka

Judgement :

1 R IN THE HIGH COURT OF KARNATAKA KALABURAGI BENCH DATED THIS THE3D DAY OF SEPTEMBER, 2015 BEFORE THE HONBLE MR. JUSTICE A.V.CHANDRASHEKARA CRIMINAL APPEAL NO.579/2015 BETWEEN:

1. SARDAR S/O HATIRAM JADHAV NOW AGED28YEARS, OCC: COOLIE R/O ERAKPALLI THANDA, TQ. NARAYANKHED DIST. MEDAK (AP) 2. GYANESHWAR S/O BABURAO NOW AGED29YEARS, OCC: COOLIE R/O GOTAKA THANDA TQ. LOHA DIST. NANDED MAHARASHTRA STATE3 DEVIDAS S/O BALAJI CHAVAN NOW AGED38YEARS OCC: COOLIE R/O CHONDI THANDA TQ. LOHA DIST. NANDED, MAHARASHTRA STATE4 VIJAYKUMAR S/O BAPURAO CHAVAN NOW AGED28YEARS, OCC: COOLIE R/O CHONDI THANDA TQ. LOHA DIST. NANDED, MAHARASHTRA STATE (BY SRI. ANIL KUMAR NAVADI, ADV.) ... APPELLANTS2AND: THE STATE THROUGH HALLIKHED POLICE STATION TQ. HUMNABAD DIST. BIDAR. (BY

SRI. P.S. PATIL, HCGP) ... RESPONDENT THIS CRIMINAL APPEAL IS FILED UNDER SECTION 374(2) CR.P.C BY THE ADV. FOR THE APPELLANT PRAYING THAT THIS HON'BLE COURT MAY BE PLEASED TO SET ASIDE THE

ORDER

DATED:18.4.2015 AND SENTENCE DATED 22.4.2015, PASSED BY THE PRL. DIST. & SESSIONS JUDGE, BIDAR, (NDPS) NO.17/2012- CONVICTING THE APPELLANT/ACCUSED NO.1 TO 4 FOR THE OFFENCES P/U/S 20(B)(II)(B) OF NDPS ACT, 1985 R/W SEC.34 OF IPC. IN SPL. CASE THIS APPEAL COMING ON FOR FINAL HEARING THIS DAY, THE COURT DELIVERED THE FOLLOWING:

JUDGMENT

Appellants are accused in a special case in Spl.Case No.17/2012 which was pending on the file of Special Judge, Bidar. They have been convicted for the offences punishable under Sections 20(B)(ii)(b) of the Narcotic Drugs and Psychotropic Substances Act, 1985 read with Section 34, I.P.C. They have been sentenced 3 to undergo RI for a period of 10 years each and to pay a fine of Rs.1,00,000/- each, vide considered judgment of conviction and sentence dated 18.4.2015 and 22.4.2015 respectively. They are in judicial custody.

2. The present appeal filed under Section 374, Cr.P.C. is directed against the said judgment of conviction and sentence.

3. Mr.Anilkumar Navadagi, learned counsel representing the appellants and Mr.P.S.Patil, learned HCGP for the State have submitted arguments at length.

4. The facts leading to the trial conducted by the special judge, Bidar, are as follows: a) The sub inspector of Halikhed police station, Bidar District, who is examined as PW10, is stated to have received credible information on 27.11.2011 while he was in the police station that some persons had held 4 ganja illegally and they were attempting to sell the same near the railway bridge in the vicinity of BSSK Sugar Factory. Immediately PW10-Suresh secured PW9- Dr.Nagnath Hulsure, Govt. medical officer and two independent panchas-PW1 and PW2 along with his staff and came near the bridge in the vicinity of BSSK sugar factory at

about 11.45 a.m. When they were waiting there, four persons were sitting on a motorcycle with bags. They were confronted by him and his staff. b) On enquiry, they disclosed their names and identity. They were found possessing a plastic bag containing ganja and it was got weighed with the help of a spring scale. The total quantity possessed by them was 4.5 kgs. c) The PSI collected 100 gms. for sample and put it in a cloth bag and sealed it in the presence of panchas so as to send it for chemical test. He is stated to have written panchanama in the presence of PW9 and other 5 panchas and came back to the police station along with the contraband and submitted a report to the SHO and handed over the sample packet and seized ganja and also handed over the custody of the accused to the SHO. d) The SHO, on receipt of the said report and panchanama, registered a case in Crime No.17/12 for the offences punishable under Section 20(B)(ii)(b) of the NDPS Act. The PSI conducted the entire investigation and chose to file charge sheet for the above offences. Consequent upon the charges being framed against the accused, they had pleaded not guilty and had claimed to be tried. e) In order to bring home the guilt of the accused, prosecution has examined in all 12 witnesses and got marked 14 documents and 5 material objects. PW1- Bhimareddy and PW2- Rajkumar are independent witnesses to the seizure mahazar. They have not supported the prosecution case. PW3-Santosh is the man who weighed the ganja with the help of a scale. PW4-Sanjeevkumar is the photographer who is stated to have taken the photograph at the time of weighing ganja in the presence of panchas. PW5 was a member of the raiding party and was working in the police station. PW6-Bakappa was the SHO who received the report from PW1 and registered the case. f) PW7-Khaja Hussain the PSI was is the IO who conducted the entire investigation and filed charge sheet. PW8 the head constable was in the raiding party. PW9-Dr.Nagnath Hulsure was the Govt. medical officer of Halikhed police station and had accompanied PW1 at the time of conducting raid. PW10-Suresh was the head of the raiding party. PW11-Veershetty was the police constable who handed over the cloth bag containing the sample ganja to FSL. 7 g) M.O.1 was cash of Rs.210/- seized from the accused. M.O.2 was the motorcycle stated to have been held by the accused and 3 others. M.O.3 was the plastic bag containing 4.5 kgs. of ganja seized from the accused, M.O.4 was the towel and M.O.5 was the cloth bag containing sample ganja.

5. Mr.Anilkumar Navadagi, learned counsel for the appellants has vehemently argued that the independent witnesses have not supported the prosecution case in regard to the seizure of ganja and that the evidence of official witnesses does not inspire the confidence of the court. He has argued that the NDPS Act is a special statute providing for harsher punishment and therefore mandatory provisions of the Act will have to be strictly complied with. He has further argued that non-compliance of the mandatory provisions of the Act would make the case of the prosecution untrustworthy. Hence he has requested the court to acquit the accused 8 in the light of non-compliance of Sections 42 and 52A and the inordinate delay in allegedly sending the sample ganja to FSL.

6. Per contra, Mr.P.S.Patil, learned HCGP representing the State has vehemently supported the judgment of conviction and sentence, contending that there is no reason to disbelieve the evidence of official witnesses who were members of the raiding party. He has argued that in spite of independent witnesses not supporting the prosecution case, the same will not make the prosecution case weak in any manner. He has further argued that taking into consideration the gravity of the offence and the age of the accused, the sentence imposed on them is quite proportionate and just and proper.

7. After hearing the arguments and perusing the records, the following points arise for consideration of this court:

9.

1) Whether the learned judge of the special court is justified in convicting the accused in respect of the offences for which they have been charged?.

2) Whether any interference is called for in regard to the sentence imposed on them, and if so, to what extent?. R E A S O N S8 Point no.1: The case of the prosecution is that PW10-Suresh who was the PSI of Halikhed police station of Bidar district from 2.12.2010, has stated that on 27.11.2011 when he was in the police station, at 11.00 a.m. he received a credible information to the effect that some persons were found possessing ganja near BSSK sugar factory and they were selling the same. Therefore he took the assistance of PW9-Govt. doctor, his

staff and two independent panchas and went to the spot. He has further deposed that he also took the assistance of a person to weigh the ganja and also a photographer to take photos of the seizure. They were 10 stated to be waiting near the factory covering themselves behind big trees. At that time they saw 4 persons standing near a Hero Honda motorcycle holding a plastic bag. They were surrounded and caught hold of. They disclosed their names and identities. On seeing the bag, PW1 and his staff found that it contained ganja leaves and on enquiry, accused told them that they had brought it from Andhra border. On further enquiry, they told him that they had not obtained any licence. On weighing the bag, the quantity of ganja was 4.5 kgs. Out of it, 100 gms. was taken out for sample and seized in the presence of panchas. A towel worn by the accused was also seized and photographs were taken in regard to the seizure and they have been marked as Exs.P1 and P2. Panchanama was drawn to this effect between 11.45 a.m. and 1.45 p.m. and it is marked as Ex.P3. He has identified his signature at Ex.P3(a). 11 9. The motorcycle possessed by the accused was also seized. Apart from this, a sum of Rs.210/- was also seized. After writing the panchanama, he is stated to have come back to the police station along with the accused and handed over the report to PW6-Bakappa and the report is marked as Ex.P9. PW6 registered a case in Crime No.134/11 for the above offences and first information was registered and submitted to the special judge at 9.00 p.m. on the same day through P.C. 1633, which is marked as Ex.P10.

10. The cover containing sample ganja weighing 100 gms. was sent to FSL, Kalaburagi through PW11- Veerashetty (P.C.971). Ex.P8 is the report certifying that the sample sent for chemical analysis was ganja and the said report is stated to have been given after proper analysis. Ex.P12 is stated to be a copy of the station house diary dated 27.11.2011 which discloses that at 11.00 am., PW10-Suresh received information 12 and a note was made to that effect, and he left the place along with his staff to conduct raid. An entry is also forthcoming in regard to the raid conducted and the persons arrested and the time of that entry in the SHO diary is 2.30 p.m.

11. The learned judge of the trial court has placed reliance upon Exs.P1 and P2- photographs stated to have been taken by the police in regard to the possession

of ganja by the accused and weighing of the same with the help of a scale in the presence of panchas and a doctor. Of course these photographs disclose that the four accused had sat on the ground and police officials and staff had sat behind them and the plastic bag with some leaves was found. The motorcycle was also found parked near them beneath some trees.

12. Photographs are not primary evidence and the same will have to be proved by producing negatives. Even otherwise, Exs.P1 and P2 do not disclose the date 13 on which they were taken. Section 52A of the NDPS Act speaks about disposal of seized narcotic drugs and psychotropic substances. Section 52A(2) deals about the mandatory procedure to be followed by the officer concerned on receipt of the seized drug or psychotropic substance. Sub-sections (2) to (4) of Section 52A of the Act are very relevant and they are extracted below:

52. (2). Disposal of seized narcotic drugs and psychotropic substances: .

2. Where any (narcotic drugs, psychotropic substances, controlled substances or conveyances) has been seized and forwarded to the officer-in-charge of the nearest police station or to the officer empowered under section 53, the officer referred to in sub-section (1) shall prepare an inventory of such (narcotic drugs, psychotropic substances, controlled substances or conveyances) containing such details relating to their description, quality, quantity, mode of packing, marks, numbers or such other identifying particulars of the (narcotic drugs, psychotropic substances, controlled substances or conveyances) or the packing in which they are packed, country of origin and other particulars as the officer referred to in sub-14 section(1) may consider relevant to the identity of the (narcotic drugs, psychotropic substances, controlled substances or conveyances) in any proceedings under this Act and make an application, to any Magistrate for the purpose of:- a) certifying the correctness of the inventory so prepared; or b) taking, in the presence of such Magistrate, photographs of such drugs or substances, or conveyances and certifying such photographs as true; or c) to draw allowing representative samples of such drugs or substances, in the presence of such Magistrate and certifying the correctness of any list of samples so drawn.

3. Where an application is made under sub-section (2), the Magistrate shall, as soon as may be, allow the application.

4. Notwithstanding anything contained in the Indian Evidence Act, 1872 (1 of 1872) or the Code of Criminal Procedure, 1973 (2 of 1974), every court trying an offence under this Act, shall treat the inventory, the photographs of narcotic drugs, psychotropic substances, controlled substances or conveyances and any list of samples drawn under 15 sub-section (2) and certified by the Magistrate, as primary evidence in respect of such offence. Mere seizure of the drug or substance would not be sufficient. The seized articles will have to be produced before the SHO or concerned authorized officer. After receipt of the drug or substance, the officer in charge of the case in the police station or officer empowered under Section 53 will have to make an inventory containing all the details relating to description, quantity, quality, mode of packing, or such other particulars and the manner in which it is packed, the country of origin and other particulars as may be relevant. In this regard the concerned officer in charge of the police station may make an application to any magistrate in order to get the correctness of the inventory so prepared, certified, or photographs may be taken in the presence of such magistrate. It also provides for allowing to draw representative samples of drugs or substances in the presence of the magistrate 16 and certifying the correctness of the list of samples so drawn.

13. If such certificate is made by the magistrate and the photos taken in his presence relating to the inventory, they could be treated as primary evidence. In the present case, no such procedure has been conducted. This is a serious lapse committed by PW6- Bakappa who is stated to have seized the ganja and put 100 gms. in a cloth bag while registering the case.

14. What exactly is the procedure to be followed by a Station House Officer or an officer authorized under Section 53 of the Act after receiving credible information, is enumerated in Section 42 of the Act. If a police officer receives credible information about some persons being in possession of a substance or drug or selling the same, while he is in the police station, he has to invariably make a note of it and report immediately to his superior officer. If he is not in the police station

or if 17 he is on patrol duty or otherwise engaged in any other duty outside the police station, he has to intimate the same to his immediate police officer without any undue delay.

15. A Constitutional Bench of the Honble Supreme Court in the cases of KARNAIL SINGH .v. STATE OF HARYANA reported in [2009]. 8 SCC539 has dealt with at length about the effect of non-compliance of Sections 42(1) and (2) of the NDPS Act. The pith and substance of the law laid down in the said case is found in paragraph 35 at page 554 of the judgment. The same is extracted below: 35. 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 Sajjan 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:

18. (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, 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. (c) In other words, the compliance with the requirement 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 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 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. What is held in the said decision is that total compliance of the provisions of Section 42 of the Act is required and substantial compliance is not the requirement.

16. PW10-Suresh has deposed that at 11.00 a.m. on 27.11.2011, he was in the police station and at that time he received a credible information that some persons were selling ganja near BSSK sugar factory. He went to the spot along with his staff and PW9-medical officer, a photographer and 2 independent panchas. It is true that in Ex.P12 a copy of the station house diary, there is reference about the receipt of credible information by him at 11.00 a.m. After the raid was conducted, he came back and has made another entry at 12.30 p.m. relating to the names of persons arrested, seizure of ganja. Thus the first part of Section 42(2) has been complied with. He chose to make a note in the diary. This information ought to have been passed on to his immediate superior officer without any undue delay. In his cross-examination, PW10 has deposed that he sent the message through e-mail to the S.P. But nothing is placed on record to show that he did send such message through email to the superintendent of police. He has deposed that before conducting raid, he sent the message to the SP through e-mail at 11.00 a.m. Mere deposition to that effect would be insufficient and it ought to have been substantiated by producing the necessary documents. If he had really sent email, obtaining a copy of the same from the computer would not have

been difficult and it would have disclosed the time at which it was sent and the contents therein. Non-production of the same would enable the court to draw an adverse inference under Section 114(g) of the Evidence Act.

17. Suffice to state that the mandatory provisions of Section 42 of the NDPS Act, as explained by the Honble apex court in the case of KARNAIL SINGH are not followed. The mandatory provisions are an absolute necessity since harsher punishments are provided under the Act.

18. In the case of JITENDER .v. STATE OF MADHYA PRADESH (2003 SAR902, the Honble apex court has held that the best evidence in a case arising out of NDPS Act would be to produce the very seized materials before the trial court and getting them marked as material object. Mere oral evidence of the officer concerned and production of panchanama is not sufficient. It is further held that in the event of independent panchas having turned hostile, the 23 panchanama is nothing but a document written by the concerned police officer.

19. In the present case, though production of the entire seized ganja before court would be difficult, nothing would come in the way of the investigation officer to have complied with the provision of sub- sections (2) and (4) of Section 52A of the NDPS Act. Whenever the seized ganja is produced before the officer in charge of the police station or the officer authorized under Section 53, a detailed inventory will have to be done with regard to all minute details of the identity, in the presence of the magistrate, along with photographs. Such evidence would be primary evidence to prove the seizure of the entire seized substance or narcotic drug. In the light of the decision in the case of JITENDAR (supra), there has been a serious lapse committed by the police officer. If steps had been taken under Section 24 52A of NDPS Act, production of seized ganja before the Court could be dispensed with.

20. Mr.Anilkumar Navaagi, learned counsel for the appellants has vehemently argued that the sample ganja weighing 100 gms. stated to have been seized by the police and kept in a cloth bag/cover should have been sent to the FSL for test at the earliest. The said quantity of 100 gms. was allegedly taken out from the bag containing 4.5 kgs. of ganja on 27.11.2011, but the sample was sent to the FSL

only on 14.12.2011. No sample seal had been sent to FSL, i.e. the seal allegedly put on the bag with the sample seal to ascertain the exact identity. This is also a serious lapse which will have to be taken as an additional circumstance which goes against the prosecution.

21. The learned judge has observed in paragraph 29 of the judgment that Ex.P12, copy of Ex.P13 is admissible evidence under Section 32 of the Evidence Act and it is 25 maintained in the usual course of business. There is no second opinion about this. But whether the information so incorporated was communicated to his immediate officer, is the question. The answer is very silent to that effect. PW6-Bakappa who registered the case and took the seized ganja from PW10 did not follow the mandatory procedure enumerated under Section 52A of the Act. Non-preparation of inventory in terms of sub- sections (2) and (4) of Section 52A of the Act is fatal to the prosecution case.

22. What is held in the case of KARNAIL SINGH (supra) is that there is a need to maintain balance between stringent laws for drug trafficking by well organized smugglers and the compliance of the mandatory provision of the Act by officers empowered. The need to strike a proper balance between the two is stressed. 26
23. Section 55 of the NDPS Act prescribes the conditions in respect of search to be conducted and the safeguards cited in the provision make it imperative and obligatory, casting a duty on the investigating officer to ensure that search and seizure are conducted as prescribed under Section 50 of the Act.

24. The credible information so received by PW10 in the police station was not communicated to his superior officer either immediately or within a reasonable time. Even PW6-Bakappa who registered the case after receipt of seized ganja and the accused does not speak anything about information being given to the superior officer about the same. The subsequent IO-PW7, Khaja Hussain also does not speak anything about the information being given to his immediate officer about seizure of ganja. The learned judge has attached too much importance to the oral evidence of the police officer without testing the case on the touchstone of the 27 mandatory provisions of Sections 42 and 52A(2) and (4) of NDPS Act. Thus viewed from any angle, the learned special judge is not justified in coming to the

conclusion that the prosecution has proved the guilt of the accused beyond all reasonable doubt. The learned judge has failed to recognize non-compliance of the mandatory provisions. Hence point no.1 is answered in the negative.

25. Therefore, this Court is of the considered opinion that the police officers who deal with cases arising out of NDPS Act, 1985 are expected to know the intricacies of the mandatory provisions of NDPS Act. Though in many cases search and seizure will be in accordance with the provisions of the Code of Criminal Procedure, the cases end in acquittal of the accused for non-compliance of certain important mandatory provisions. Hence, it is necessary that the Narcotic Wing of the state police and the CBI may think of evolving a suitable manual in the light of the leading decisions of the Honble Apex Court touching some important aspects of the Act. This will enable the officers concerned to do effective investigation and avoid acquittal on technical grounds. This Court hopes that the State Police and CBI would do their best in sensitizing their officers about the nuances and niceties involved in investigating cases arising out of NDPS Act.

26. Point no.(2): In view of the negative finding on point no.1, the judgment of conviction and sentence passed by the learned special judge is not sustainable either in law or on facts. Accordingly it is liable to be set aside.

27. In the result, the following order is passed:

ORDER

The appeal filed under Section 374(2), Cr.P.C. is allowed in its entirety, setting aside the conviction and sentence passed in Spl.Case No.17/12 by the Special Judge, Principal District Judge and Sessions Judge, Bidar, against the appellants for the offences punishable under Section 20(B) (ii)(b) of the NDPS Act, 1985, read with Section 34, I.P.C. The appellants are acquitted of all the charges levelled against them. They shall be released forthwith if they are not required in any other case Registry to intimate the concerned jail authorities by sending the operative portion of this order, without undue delay. Registry to send a copy of this judgment to the Director General and Inspector General of police, Nrupatunga Road, Bangalore, and Central Bureau of Investigation, New Delhi, for reference. Sd/-
JUDGE vgh*

