

Krishna Sah Vs. the State of Bihar

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Court : Patna

Decided On : Dec-08-2006

Judge : Ghanshyam Prasad, J.

Appellant : Krishna Sah

Respondent : The State of Bihar

Disposition : Appeal dismissed

Prior history : Ghanshyam Prasad, J. 1. The appellant who was sole accused in Excise Case No. 8/37 of 2002 has been convicted under Section 23 of N.D.P.S. Act and sentenced to undergo R.I. for ten years and pay fine of Rs. 1,00,000/- and. in default to undergo R.I. for one year. 2. Prosecution story in brief is that on the basis of secret information a team led by Mr. V.K. Sinha, Superintendent of Customs, Motihari was formed to nab drug smugglers. The team, on 5.2.2002, laid a trap near Lakhaura, intercepte

Judgement :

Ghanshyam Prasad, J.

1. The appellant who was sole accused in Excise Case No. 8/37 of 2002 has been convicted under Section 23 of N.D.P.S. Act and sentenced to undergo R.I. for ten years and pay fine of Rs. 1,00,000/- and. in default to undergo R.I. for one year.

2. Prosecution story in brief is that on the basis of secret information a team led by Mr. V.K. Sinha, Superintendent of Customs, Motihari was formed to nab drug smugglers. The team, on 5.2.2002, laid a trap near Lakhaura, intercepted a jeep bearing No.NL-04 of 1643 and after hot chase and firing it was made to stop near Chaura Danu Railway crossing. The driver of the jeep (appellant) tried his best to escape but ultimately he was caught by the team.

3. The jeep alongwith accused/driver was brought to the custom office, Motihari. On the basis of confessional statement of the accused-appellant, search of the jeep was made in presence of independent local witnesses and recovered 90 kgms. of Nepali ganja consealed in false chamber of the jeep. Thereafter, the accused-appellant was arrested and the sample of the seized ganja was sent to the anyalyst for chemical examination. Ultimately, complaint was lodged against the accused-appellant by Inspector of Customs Mr. P.K. Mishra (P.W.1).

4. In course of the trial, prosecution examined as many as 11 witnesses including the complainant as P.W.1 and witness of seizure as P.W.10 Sanjay Pandey. Other witnesses are officials and constables of Custom Department.

5. Defence of the accused-appellant, as disclosed in his statement under Section 313 Cr.P.C., is false implication. According to him, he was working in a garage and on request of the owner of the jeep he had accompanied him to Nepal for settlement of marriage. He had no knowledge about concealment of ganja nor was driving the jeep. It was actually driven by one Buti Khan who had fled away at the time of the chase. However, neither oral nor documentary evidence has been adduced in support of the defence.

6. The learned counsel for the appellant challenged the judgment in question mainly on the ground on non-compliance of mandatory provisions of N.D.P.S. Act including Sections 42, 50 and 55.

7. Section 42(1) of the Act provides that if the officer concerned has reason to believe from personal knowledge or information given by any person should be taken down in writing. Section 42(3) provides that the copy of such belief or information shall forthwith be sent to immediate superior officer. It is submitted on

behalf of the. accused-appellant that in this case, there is complete violation of the above provision which is apparent from evidence of P.W.1 and hence, the provision being mandatory, the prosecution case must be thrown in wind.

8. Further submission of the learned counsel for the appellant is that the search and seizure was made in complete violation of Sections 50 and 51 of the Act as well as provisions of Criminal Procedure Code. Search and seizure was not done in presence of any local independent and respectable witness. One. of the two witnesses of search and seizure has also not been examined in this case and hence the fact of search and seizure cannot be believed only on the basis of evidence of constables and other officials of Custom Department.

9. The third submission is that prosecution has also not complied with mandatory provision of Section 55 of the Act. It is submitted that as per provision of Section 55, the seized article should have been handed over to Officer-in-charge of local police station to be kept in sealed cover for future reference. But the seized ganja was not handed over to local police station which also throws doubt upon the seizure of the ganja in question.

10. Without entering into the factual aspect of the above submission of the learned counsel for the appellant, let us examine the consequences of violation of above provisions of the Act. In this respect, I would like to rely upon two decisions, one being of Bombay High Court reported in 1989 Cr. Law Journal 430 (Abdus Sattar v. State) and the other 1994 Supreme Court 1872 (State of Punjab v. Balbir Singh).

11. In the decision reported in 1989(Supra) effect of non-compliance of Sections 41 to 58 of the Act has been elaborately dealt with., In paragraph-5 of the judgment, it has been held as follows:

We have no quarrel with the submission made by Mr. Dessai that whenever a search is conducted, it is always advisable, as required by Section 100(4) of the Criminal Procedure Code, to have two independent and respectable witnesses who are residents of the locality. We too have in general no quarrel with the proposition that if a case, particularly a case under the Narcotic Drugs Act, is

sought to be proved only through police officers and no independent witness is examined, such evidence is to be scrutinized carefully and is, ordinarily, doubtful. We need not, therefore, advert in detail to the authorities cited across the Bar by the learned counsel. Those authorities indeed merely emphasize the above position of the law and the decisions were given by the Courts on the particular facts of the before them. But, if we have no quarrel with the above propositions, we may also note that the mere fact that witnesses who are not residents of the locality are taken by a raiding party to witness a raid, is not sufficient to vitiate the proceedings. Similarly, even if no independent witnesses but only police officers are examined to prove the case, that will not by itself constitute a fatal infirmity, for that would warrant and require a very cautious and careful examination of their evidence, but not discarding it summarily on that count.

In paragraph-15 of the said judgment, it has further been held as follows:

Thus, even if the provisions of Sections 41 to 58 of the Act are mandatory and were not complied with, this procedural infirmity would not by itself vitiate the conviction of the appellant. The only question that thus remains to be determined is whether the non-compliance with the said provisions had caused any prejudice to the appellant. The answer to this question is manifestly, in the negative. We indeed do not see, and the learned counsel for the appellant was unable to satisfy and show us, in what manner the omission in recording in writing the information received and in reporting it to the superiors could have and had in the facts of this case, where the recovery is proved to be genuine, prejudiced the appellant. In any event, we find no force in the submission of Mr. Dessai that the prosecution was found to establish that the said provisions of law had been complied with. In fact, the police officers had been acting in discharge of official duties, and therefore, a presumption that acts done by them had been regularly performed militates in favour of the prosecution under Section 114(e) of the Evidence Act. We may also mention that Mr. Bhoje is right in submitting that the decision in Hakam Singh's case 1988 Cri LJ 528 (Punj and Har) is an authority to that particular case and does not lay down any law.

12. In above decision of Supreme Court also the effect of non-compliance of different provisions of N.D.P.S. Act as well as Criminal Procedure Code has been considered. In paragraph-8 of the decision, it has been held as follows:

It therefore emerges that non-compliance of these provisions i.e. Sections 100 and 165, Cr.P.C. would amount to an irregularity and the effect of the same on the main case depends upon the facts and circumstances of each case. Of course, in such a situation, the court has to consider whether any prejudice has been caused to the accused and also examine the evidence in respect of search in the light of the fact that these provisions have not been complied with and further consider whether the weight of evidence is in any manner affected because of the non-compliance. It is well settled that the testimony of a witness is not to be doubted or discarded merely on the ground that he happens to be an official but as a rule of caution and depending upon the circumstances of the case, the courts look for independent corroboration. This again depends on question whether the official has deliberately failed to comply with these provisions or failure was due to lack of time and opportunity to associate some independent witnesses with the search and strictly comply with these provisions.

13. In paragraph-26 of the said judgment, findings upon non-compliance of different provisions has been summed up. The relevant findings is in sub para 2(C) which runs as follows:

(2C). Under Section 42(1) the empowered officer if has a prior information given by any person, that should necessarily be taken down in writing. But if he has reason to believe from personal knowledge that offences under Chapter IV have been committed or materials which may furnish evidence of commission of such offences are concealed in any building etc., he may carry out the arrest or search without a warrant between sunrise and sunset and this provision does not mandate that he should record his reasons of belief. But under the proviso to Section 42(1) if such officer has to carry out such search between sunset and sunrise, he must record the grounds of his belief.

To this extent these provisions are mandatory and contravention of the same would affect the prosecution case and vitiate the trial.

14. From the above two decisions, it is quite clear that the effect of non-compliance of provisions of various sections which relate to procedure of search and seizure depends upon as to whether any prejudice has been caused to the accused or not. The other factor which emerges from the above decision is careful and cautious examination of materials. However, in any case, non-compliance of the above provisions has not been considered as fatal ipso facto.

15. In this case, materials available on the record go to show that there is no question of any prejudice caused to the accused-appellant as a result of non-compliance of either Section 42 or 50 or 55 of the N.D.P.S. Act.

16. Apart from oral evidence, the accused-appellant himself has admitted about recovery of ganja from the jeep in question. In statement recorded under Section 313 of the Cr.P.C. he has admitted that he was one of the occupants of jeep in question bearing No. NL 04/1643 which was coming from the side of Nepal. In course of enquiry, the custom official also recorded statement of the accused-appellant under Section 67 of the N.D.P.S. Act as well as under Section 108 of the Customs Act. Those statements are Ext. 3 and 7. Of course, the accused-appellant in his statement under Section 313 Cr.P.C. denied about confession but has not uttered even a single word that Ext. 3 and 7 have been obtained by custom officials under duress or coercion. On the other hand, P.W.1 and P.W.10 have proved these statements. The defence has not specifically challenged the statement of the accused-appellant as involuntary or obtained through coercion, in cross examination of those witnesses.

17. In Ext. 3 as well as in Ext. 7, the accused-appellant in a very clear terms has admitted about the whole story of prosecution including search, seizure and recovery of 90 kgms. of ganja from the false chamber made in the jeep in question. He has also admitted about preparation of Panchnama and seizure memo (Ext. 1 and 2) in his presence bearing his signatures. There are catena of decisions of apex court and other High Court that the statement of the accused recorded by the custom officials under Section 67 of the N.D.P.S. Act is admissible and not hit by the provision of Section 25 of the Evidence Act.

18. Apart from the above documents, the large number of witnesses, though officials of Custom Department including the informant (P.W.1) have fully supported the prosecution story including arrest, search, seizure and recovery of 90 kgms. of ganja from false chamber of jeep in question. They have also proved that the jeep in question was occupied by accused-appellant. P.W.10 Sanjay Pandey is an independent local witness who is witness of Panchnama seizure memo as well as statement of the accused-appellant. He has fully supported the prosecution story on each and every material point.

19. The other important witness is P.W.2 Binay Kumar Sinha who is Superintendent of Customs under whose leadership a team had been formed to nab the criminal. He has stated the full story of prosecution including the search, seizure and recovery of ganja from false chamber of jeep occupied by the accused-appellant. He has also supported the fact that the accused-appellant voluntarily confessed about his guilt in his statements which are Exts. 3 and 7. Other witnesses who have supported the prosecution case are mostly constables of Custom and Excise Department. Complainant (P.W.1) is Inspector of the Custom Department.

20. Ext. 8 is the report of the chemical analyst. He examined the sample of seized article and according to the report the sample had all characteristic of ganja. P.W.11 Mahendra Singh is Inspector of Custom and Incharge of godown. He has proved destruction of the seized ganja. Ext. 10 is the report of destruction. It goes to show that the ganja of this case alongwith other cases was destroyed under the orders of the court on 13.2.2003 in presence of Executive Magistrate and officials of the Custom Department, Motihari.

21. Thus, from the above discussions, it is quite clear that there is no question of any prejudice caused to the accused-appellant or infirmity in the judgment in question. The learned lower court has rightly convicted the accused-appellant under Section 23 of the N.D.P.S. Act. So far sentence awarded to the accused-appellant is concerned, it also does not warrant any interference as it is minimum sentence prescribed under the law.

22. In the result, this appeal is dismissed and the judgment of conviction and sentence passed by the lower court is hereby confirmed.

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