

Abdul Sattar Vs. State

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Court : Mumbai

Decided On : Jun-15-1988

Reported in : 1989(1)BomCR388; 1989 Cri LJ 430

Judge : G.D. Kamat and ;Dr. G.F. Couto, JJ.

Acts : [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 100(4), 103, 165 and 391(1); Evidence Act - Sections 114

Appeal No. : Criminal Appeal No. 27 of 1987

Appellant : Abdul Sattar

Respondent : State

Judgement :

Dr. Couto, J.

1. This appeal by the original accused is directed against the judgment dt. 4th November 1987, continued on 11th of the same month, whereby the learned Assistant Sessions Judge, Panaji, convicted him for offences punishable under sections 20(b)(ii) and 21 of the Narcotic Drugs and Psychotropic Substances Act, 1985, (hereinafter referred to as 'the Act') and further sentenced him to undergo 10 years of Rigorous Imprisonment and to pay a fine of Rupees One Lakh, and in default, to undergo a further period of 2 years Rigorous Imprisonment on each

count, the substantive sentence having been ordered to run concurrently.

2. A charge-sheet had been filed by the Calangute Police against the appellant for offences punishable under sections 20(b)(ii) and 21 of the Act. The gravamen of the charge that on 5th March, 1986, at about 8.00 a.m. and at Calangute, the appellant was found in possession of 1 Kg. of charas and 30 gms. of brown sugar in contravention of Section 8 of the Act. The case of the police indeed is that on that particular day and time, a police party raided the house of the appellant, who in the course of the search, produced the said 1 kg. of charas by removing it from underneath a mattress which was lying on a cot as well as a small packet containing 30 gms. of brown sugar which he withdrew from the pocket of a jacket hung on a peg.

3. The appellant pleaded not guilty, his case being one of complete denial. The prosecution, therefore examined six witnesses to prove its case. The learned trial Judge held, on such evidence, that the charge was fully proved and accordingly, convicted the appellant for the offences he was charged with and then, sentenced him in accordance with law.

He now challenges his conviction, mainly, on two grounds. He first contends that the alleged seizure of the charas and brown sugar from his possession is not at all proved. Secondly, in any event, the mandatory procedure laid down in the Act had not been complied with and followed resulting in that the alleged seizure is not seizure at all in the eyes of the law.

4. As regards the appellant's first contention Mr. S. G. Dessai, the learned counsel appearing for him, urged that the prosecution has not examined any independent and respectable witness in order to prove the seizure of the charas and of the brown sugar from the possession of the appellant. He contended that this violates the provisions of S. 100(4) of the Criminal Procedure Code and to that extent, the proceedings are vitiated. In fact, according to him, the prosecution sought to prove the seizure and its case by examining the panch Sakalkar P.W. 1 Dilip Kumar P.W. 2, Ratan Fatarpenkar P.W. 3 and Apa Teli P.W. 6. None of these witnesses is independent, for Dilip Kumar, Ratan Fatarpenkar and Apa Teli are police officers and the panch Sakalkar was at the relevant time a Home Guard, and was as such,

under the influence of the police. That apart, he further contended, the pancha Sakalkar is not a reliable witness, and in any case, the evidence given by him in the trial Court by itself discloses that he was not present at the time of the alleged search and seizure. Sakalkar is admittedly a resident of Corlim, Mapusa, and therefore, it is rather surprising and difficult to believe that he was at Calangute, at about 7.30 to 8.00 a.m. In addition he did not confirm what is recorded in the panchanama, particularly the sequence of the recoveries of the articles mentioned therein. He also never mentioned that another pancha was present at the time of the search and he alone states that two women were present when the raiding party reached the appellant's house. Reliance was placed in support of the above submissions in *Rattan Lal v. State* : 32(1987)DLT1 , *Prem Lata v. State of Himachal Pradesh* and *Bhagwan Singh v. State of Rajasthan*, : 1976 CriLJ713 .

5. 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.

6. We may now analyse the evidence adduced by the prosecution in order to see whether the panch Sakalkar is an independent and reliable witness. It is clear from the deposition of the said witness that he is resident of Corlim, Mapusa, and that

the search was conducted at about 8.00 a.m. at Calangute, a village that lies at a distance of less than 10 Kilometers from Mapusa. Sakalkar stated that he was called by P.S.I. Teli of the Calangute Police Station to stand as a witness in a search that was going to be conducted. He was taken to the Calangute Police Station where Dilip Kumar P.W. 2, some police constables and a lady constable, as well as another panch, were present. He then stated that all of them sat in a jeep, and thereafter, went to the house of the accused, who was standing at the door. The police officers identified themselves, and thereafter, all of them entered the house which comprises two rooms. He deposed that nothing was found in the front room, but in the second room which is made by the use of a partition, a packet in a plastic wrapper and about 6 to 8 inches long was found underneath a mat lying on a cot. The police opened the said packet and stated that its contents were charas. He further stated that a balance and some measures of weight were found under the said cot. There was a jacket hanging on a peg in the said room. The appellant then walked towards the said jacket and removed a packet from one of its pockets and gave it to the police. It was a small packet of about 1 x 1 inch covered by plastic paper. The said packet contained some powder which the police said to be white powder. According to the witness, the charas and the said powder were weighed, the charas being found to be weighing 1 Kg. and the said powder 30 gms. Thereafter, 20 gms. of charas and 5 gms. of the said powder were taken as samples and duly sealed in two separate envelopes for the purposes of being sent for analysis. The remainder of the charas and of the powder had been also duly sealed in two separate envelopes. He identified M.O. 1 as being the envelope containing the charas found in the house of the appellant as well as the M.O. 2 as being the powder and the M.O. 3, the balance with the weights, found in the course of the search.

7. We already stated that Mr. Dessai found some infirmities in this evidence, that according to him, vitiate and make it unreliable. He, in fact, strongly objected to the said evidence and first contended that it was not expected of a resident of Corlim, Mapusa, to be present at Calangute at about 7.30 to 8.00 am. There is however, no merit in this submission as the witness Sakalkar stated in the course of his statement that he is a motor-cycle pilot; on the day of the raid, i.e. on 5th March, 1986, a passenger had hired his motor-cycle at about 7.30 a.m. and as such, he

had taken him to a place in the neighbourhood of the Calangute Police Station, and as this statement made by the witness in the course of the examination-in-chief stands since it has not been challenged in the cross-examination and only general suggestions were put to him that he was not present at the time of the search.

He then drew our attention to the panchanama of the search drawn on the occasion and the sequence of the recovery recorded therein saying that the charas were recovered in the first first place, then the powder and finally the balance Mr. Dessai contended that this sequence is in variance with the recovery sequence stated by Sakalkar while deposing in Court and thus, this variance in the sequence of the recovery as shown in the panchanama and as deposed by Sakalkar in Court, gives a clear indication that the said witness was not present at the time of the search, and further shows that no second pancha was present at the time of the search. He next contended that it is further seen from the evidence of Sakalkar in Court that the charas were recovered from underneath a mat which was lying on a cot. In the panchanama however, it is recorded that the said charas had been removed from under a mattress which was lying on a cot. This, according to the learned counsel, corroborates that Sakalkar was not present at the time of the search. We find no force in the above submissions of Mr. Dessai. Undoubtedly, the witness Sakalkar has mentioned in the course of his evidence in Court that the charas had been removed from under a mat lying on a cot. Equally true is that it has been recorded in the panchanama that the charas had been removed from under a mattress lying on a cot. There is, thus, a discrepancy in that a reference is made in the panchanama to a mattress and to a mat in the deposition of Sakalkar. This discrepancy, however, is, in our view, minor in nature and in no manner affects and makes doubtful the material and substantial facts that charas had been recovered from the cot lying in the room and thus, whether the said charas were merely covered by a mat or by a mattress is not material. In any event, we may point out that this minor discrepancy might have crept in due to a typing mistake as it appears that the witness deposed in Konkani and his evidence was recorded, as it happened with the panchanama, in English and nowhere else a reference to a mat is made.

Similarly, the slight divergence in the sequence of the recovery of the charas, balance and brown sugar, between what Sakalkar deposed in the trial Court and what is recorded in the panchanama is of no consequence. Sakalkar has no doubt, stated that the charas was recovered first, then the balance and finally the brown sugar and that the sequence of recovery recorded in the panchanama is slightly different, for it is recorded therein that the charas were recovered first, then the brown sugar and finally the balance. Both these versions are not, however, at variance in the material and substantial points, as both Sakalkar's evidence in the Court and the panchanama disclose some essential common facts, namely, that the house of the accused consists of two rooms, i.e. of a big room which was divided into two by a cloth partition that the charas, the balance and the brown sugar were recovered from the second room; and that the charas were removed by the appellant from under a mat or mattress lying on the top of a cot, the balance from under the said cot and the brown sugar from the pocket of a jacket which was hung on a peg. Therefore, there is an identity between what the pancha Sakalkar stated in Court and what is recorded in the panchanama as regards the material fact of the recovery of the charas, brown sugar and the balance, from particular places and from a particular room of the appellant's house. The discrepancy in the sequence between what is recorded in the panchanama and what was stated in the Court by the pancha is, in the circumstances, inconsequential and minor in nature. That discrepancy might otherwise have been occasioned, as submitted by Mr. Bhohe, by the fact that the pancha Sakalkar was examined in Court after a quite large lapse of time, i.e. after more than 1 and 1/2 year.

8. Mr. Dessai next submitted that Sakalkar did not mention that a second pancha was present at the time of the search and he alone stated that there were two women present when the police party reached the appellant's house. These infirmities, he urged, weaken his evidence and indicate that he was not present at the time of the search. It is not possible to accept these contentions, for Sakalkar indeed stated that when he went to the Police Station, another pancha was present as well as Dilip Kumar, some head-constables and a lady constable. He further deposed that all of them sat in a jeep and went to the house of the accused. In other words, he stated that the other pancha also sat in the jeep and went to the house of the accused. He then stated that after reaching the house of

the accused and after the policemen identified themselves 'all of us entered the house of the accused which consists of two rooms'. He therefore, stated in other words that the whole raiding party entered the house of the accused. It is not doubt true that in the course of the cross-examination, he also stated that 'Dilip Kumar, PSI Gaonkar, HC Kerkar and I entered inside the house', adding that the other policemen had remained outside. The statement made by Sakalkar in cross-examination, Mr. Dessai argued means that Sakalkar, by implication, admitted that the other pancha was not present at the time of the search, as otherwise he would have expressly stated that the said pancha too had entered the house. In our view, this inference is not justified in the light of Sakalkar's earlier statement in examination-in-chief quoted above and of the circumstance that he merely said that the policemen, other than Dilip Kumar, PSI Gaonkar and HC Kerkar, had remained outside. He never stated that the other pancha had not entered and witnessed the search. Similarly, there is no force in the submission of the learned counsel for the appellant that the mention made by Sakalkar of two women, a circumstance that no other witness refers to give a clear indication that he was not at all present on the spot, for although other witnesses had said that the appellant's wife was present, the fact remains that nobody deposed that no other woman was on the spot when the raiding party arrived there. Thus, this alleged infirmity amounts to a minor discrepancy which, in our view, is not sufficient to vitiate the evidence of the witness Sakalkar.

9. It becomes thus clear that the infirmities pointed out by Mr. Dessai are not sufficient to make us discard the evidence of the witness Sakalkar. We may however, mention at this stage that at the beginning of the hearing of this case, the appellant had moved an application to adduce some fresh evidence. He produced along with the said application, some correspondence exchanged with the police as regards Sakalkar and his employment as Home Guard. This correspondence may indicate that, at the relevant time of the search, the said witness was still a Home Guard, and further, that he had been detached for duty at Mapusa on the day of the raid. We did not allow the said application as we found that the pancha Sakalkar had been thoroughly cross-examined and it had been specifically put to him that, at the time of the incident, he was still working as a Home Guard. The witness denied this suggestion and stated that, in fact, he had worked for about

two months as Home Guard, but he had left it as the payment was not regular. The correspondence which was sought to be produced was exchanged much after the delivery of the impugned judgment. The nature and the tenor of the cross-examination clearly show that the learned counsel who was appearing for the appellant in the trial Court had been instructed that Sakalkar was, at the relevant time, working as Home Guard. It was thus to be expected from the said counsel to call as witnesses on behalf of the defence the very same persons who wrote the letters stating that Sakalkar was still a Home Guard at the relevant time and that he had been detached to do some work in such capacity on the day of the raid. But we may note that even if Sakalkar was at the relevant time a Home Guard and that he had been detached for some work at Mapusa on that day, his evidence could not have been discarded on the count, for, considering the short distance between Mapusa and Calangute and the time at which he had to be on duty as Home Guard, it was not at all impossible for him to stand as a pancha in the concerned panchanama at 8.00 a.m. at Calangute, and thereafter, to attend his duties as Home Guard at Mapusa. Section 391(1) of Cr.P.C. provides that in dealing with any appeal, the Appellant Court if it thinks additional evidence to be necessary, shall record its reasons and may either take such evidence itself or direct it to be taken by a Magistrate or when the Appellate Court is a High Court by a Court of Session or a Magistrate. In the background mentioned above and in the particular facts of this case, we did not find at all necessary any additional evidence, and therefore, dismissed the said application.

10. Be that as it may, in any event there is also no merit in Mr. Dessai's submission that Sakalkar, being a Home Guard, was not an independent witness. According to him, a Home Guard is under the police and he is paid by the police. As such, he could never be a reliable and independent witness, the learned counsel urged. But, it is not so. A Home Guard is not under the police and as such, the very foundation of the above contention of Mr. Dessai is non-existent. In fact, as the Division Bench of this Court observed in *Shri Yashpal Mahindrapal Sonik v. State* (1987) 2 Crimes 909, it is common knowledge that Home Guards have nothing to do with the police department. We reiterate this view, as Home Guards are a voluntary organization which is not subordinate to or dependent on the police. This being so and considering the evidence as a whole, we find that

although the pancha Sakalkar is not a resident of Calangute, there is nothing on record to make doubtful his integrity and independence. We may also mention here, adopting the observations of the Division Bench of this Court in Amarjit Singh Cheema v. State (1987) 3 Crimes 12 that 'it is also common ground that the golden beaches of Calangute, Baga, Anjuna, Vagator and Arambol abound in foreign traffic, mostly hippies, who are well known drug addicts and the statement made by the police officer P.W. 7 that a large number of local people are involved in clandestine trade and, therefore, local panchas and witnesses are bought over and turn hostile cannot be ruled out easily'. The offences in this case allegedly took place at Calangute, and therefore, in the light of the above observations, we feel that independent and respectable witnesses residing in the locality would not easily be available to the police to accompany them for a raid under the Act. In the premises, we find no reason to discard the evidence of the witness Sakalkar which otherwise is corroborated in all the material and essential points by the evidence of P.W. 2 Dilip Kumar, P.W. 3 Ratan Fatarpenkar and P.W. 6 Apa Teli. The evidence of P.W. 4 Maria Caldeira also to some extent corroborates Sakalkar in that she stated that she received two envelopes duly sealed and with the signatures of PSI Calangute and two panchas. Those envelopes were containing samples which were analysed by her. She found one containing charas and the other morphine. We, therefore, affirm the finding of the learned trial Judge that the appellant was found in possession of 1 Kg. of charas and 30 gms. of morphine.

11. We now turn to the second challenge of the appellant. Mr. Dessai submitted that a mandatory procedure has been laid down in the Act regulating the conduct of a search and the seizure. According to him, this procedure has not been followed, and therefore, whatever search conducted and seizure done by the police, cannot be held as a search and a seizure in the eyes of the law. He took us through Sections 41 to 58 of the Act which deal with the procedure to be followed for searches and seizures under the Act, and submitted that Section 41(2) and Sections 42(1) require that a police officer empowered under the Act to make a search, in case he receives an information that causes him to conduct a search, to record in writing the said information and to report it to his superiors. The compliance with this requirement is mandatory, for those provisions constitute a safeguard provided to the benefit of the person whose premises or whose person

is searched. Then, Section 50 requires that if a search is made, the person who is to be searched can require the police officer to be produced without unnecessary delay before the nearest Gazetted Officer of any of the Departments mentioned in Section 42 or before the nearest Magistrate. This provision also incorporates a safeguard, and therefore, if this mandatory procedure is not complied with, a prejudice is caused to the accused. Reliance was placed in this regard, in *Hakam Singh v. Union Territory, Chandigarh* .

12. Mr. Bhole, joining issue, has however countered that although it is correct that when a police officer or any of the officers mentioned in Section 4(2) or Section 42(1) of the Act gets information on basis of which he acts and conducts a search, he is bound to record in writing that information and to report it to his superiors, the fact remains that it is not necessary at all for the prosecution to prove that these provisions of law had been complied with. A presumption indeed arises in favour of the prosecution in view of Section 114(e) of the Evidence Act. It is therefore, for the accused to raise the question of non-compliance of the said provisions, in the course of the cross-examination so as to enable the prosecution to satisfy the Court that it has complied with such requirements of the law. That apart, according to the learned Prosecutor, those provisions are mainly to the benefit of the officers concerned and to provide a safeguard to them. In fact, Section 58 of the Act provides for penalties in case there is a vexatious entry, search, seizure or arrest. Hence, in the event a search is conducted and nothing is recovered, then, a complaint may be filed under S. 58 of the Act against the concerned officers. Sections 41(2) and 42(1) merely provide for a safeguard to such officers. That apart, Mr. Bhole urged, the prosecution is not supposed to prove that it has acted in strict compliance with the procedure laid down in law. The prosecution is indeed merely bound to prove beyond reasonable doubt the charge framed against the accused, and once such burden is discharged, even if there is any procedural omission, such omission does not vitiate the proceedings. In this connection, the learned counsel places reliance in *Radha Kishan v. State of Uttar Pradesh* : (1963)11LLJ667SC and *Khandu Sonu v. State of Maharashtra* : 1972 CriLJ593 . He finally contended that in *Hakam Singh's* case no law was laid down and it merely expresses a view taken in the fact of the particular case before the Court.

13. It is seen that there is no reason whatsoever for discarding the evidence of the pancha Sakalkar. The infirmities pointed out by Mr. Dessai merely constitute minor discrepancies which, as rightly pointed out by the learned Public Prosecutor relying the decisions of the Supreme Court in Jagdish v. State of Madhya Pradesh, : 1981 CriLJ630 and Krishna Pillai v. State of Kerala, : AIR 1981 SC1237 , in no manner vitiate the proceedings. As observed in Krishna Pillai's case, no criminal case is free from such discrepancies, and in fact, in the words of the Supreme Court in Ousu Varghese v. State of Kerala : 1974 CriLJ624 , minor variations in the accounts of the witnesses are the hallmark of the truth of their testimony. We have also seen that the evidence of Sakalkar had been corroborated by the evidence of Dilip Kumar, Ratan Fatarpenkar and Apa Teli and that the prosecution had, therefore, succeeded in proving that the appellant was found in illegal possession of the seized charas and morphine. Thus, irrespective of whether the requirements of Section 41(2) and Section 42(1) as regards the recording in writing of the information and its report to the superiors were complied with, and irrespective of whether or not such requirements are to be mandatorily followed, it clearly flows from the record that the prosecution proved its case against the appellant.

14. Now, in Khandu Sonu's case : 1972 CriLJ593 , the Supreme Court was dealing with a submission that the investigation of the case had not been done in accordance with law, and therefore, the whole trial was vitiated. There Lordships observed as under :-

'It is well established that where cognizance of a case has, in fact, been taken by the court on a police report following investigation conducted in breach of provisions of S. 5A the result of the trial cannot be set aside unless the illegality in the investigation can be shown to have brought about a miscarriage of justice. The underlying reason for the above dictum is that an illegality committed in the course of investigation does not affect the competence and jurisdiction of the court to try the accused. Where the trial of the case has proceeded to termination, the invalidity of the preceding investigation would not vitiate the conviction of the accused as a result of the trial unless the illegality in the investigation has caused prejudice to the accused.'

Similarly, in Radha Kishan's 1963 (1) Cri LJ 809 case, it has been contended that the search and the seizure made in that case had not been in conformity with the provisions of the Criminal Procedure Code and the illegality in the search and the seizure was vitiating the trial. The Supreme Court negated the said contention and observed :

'We will deal with the last four points first. So far as the alleged illegality of the search is concerned it is sufficient to say that even assuming that the search was illegal the seizure of the articles is not vitiated. It may be that where the provisions of Sections 103 and 165, Code of Criminal Procedure are contravened the search could be resisted by the person whose premises are sought to be searched. It may also be that because of the illegality of the search the Court may be inclined to examine carefully the evidence regarding the seizure. But beyond these two consequences no further consequences ensues.'

It is thus clear that the invalidity of a preceding investigation or illegality of a search or seizure does not vitiate the conviction of an accused unless such invalidity or illegality has caused prejudice to him.

15. 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 the 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 bound 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 S. 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 is an authority to that particular case and does not lay down any law.

16. The appellant has been convicted for two offences, one being under S. 20(B)(ii) and the other under S. 21 of the Act. He was sentenced to undergo 10 years of Rigorous Imprisonment and to pay a fine of Rupees One Lakh, and in default, of such payment, to undergo a further period of 2 years of Rigorous Imprisonment on each count. Both the substantive sentences imposed and the amounts of fine to be paid are the minimum prescribed under the Act. We, however, find that the periods of Rigorous Imprisonment ordered to be undergone in default of the payment of the fines are clearly excessive in the facts of the case. Indeed, if the appellant fails to pay the fines, the net result thereof will be that he will have to undergo a further period of 4 years of imprisonment after serving the substantive sentences for 10 years, since the imprisonment for default cannot run concurrently. We are therefore, of the view that the ends of justice justify the modification of the sentence in that in case the appellant fails to pay the fines imposed on him, he will undergo a further period of 6 months of Rigorous Imprisonment on each count.

17. With this modification, this appeal stands thus dismissed.

18. Appeal dismissed.