

Badlu Maurya Vs. State of Goa

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Court : Mumbai

Decided On : Jul-15-1996

Reported in : 1997BomCR(Cri)847; 1997CriLJ1250

Judge : R.K. Batta, J.

Acts : Narcotic Drugs Psychotropic Substance Act - Sections 20, 41(2), 42(1), (2) and 50

Appeal No. : Criminal Misc. Appln. No. 73 of 199

Appellant : Badlu Maurya

Respondent : State of Goa

Advocate for Def. : G.U. Bhobe, Public Prosecutor

Advocate for Pet/Ap. : J.P. D'Souza, Adv.

Judgement :

ORDER

1. The Applicant stands charged for possession of 5 kgs. of charas under S. 20(b)(ii) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter called the said Act). The charge has already been framed against the applicant.

2. The applicant sought bail on two grounds namely : (i) The Investigating Officer had conducted the search in the house of the applicant after sunset and in

accordance with proviso to S. 42(1) of the said Act he was required to record grounds of his beliefs in terms of the said proviso. This was not done by the Investigating Officer; and (ii) The Investigating Officer did not forward the grounds of beliefs which are to be recorded under the proviso to the superior officer in terms of S. 41(2) of the said Act.

After detailed discussion of the facts and circumstances of the case, Special Judge, N.D.P.S. Court, Mapusa rejected the bail application. The applicant seeks bail on the same grounds in this application.

3. Learned Advocate Shri J. D'Souza, relied upon a judgment of the Apex Court in State of Punjab v. Balbir Singh : 1994 CriLJ3702 ; Mazzanti Esposio Gian Carlo, Italian National, holder of Passport No. 433798 at present lodged in Central Jail, Aguada, Goa v. State of Goa 1995 (1) Goa LT 5; unreported judgment of single Judge of this Court in Steven David Foigolson v. State of Goa (Criminal Misc. Application No. 144/1994) and another judgment of a single Judge of this Court in Lawarance D'Souza v. State of Maharashtra . On the basis of the grounds urged and the rulings quoted by him, Shri D'Souza seeks release of the applicant on bail.

4. Learned Public Prosecutor Shri Bhobe submitted before me that the information relating to possession of charas by the applicant was given by one Dipak alias Vaikunt Vinayak Gaonkar from whose possession 7 kgs. of charas was recovered; the statement of the said Deepak was recovered by the I.O. who wrote a letter at 8.40 p.m. to Dy. S.P. ANC informing the said facts and that he was proceeding for raid to the house of the applicant at Bicholim. Shri Bhobe has further pointed out that even before the Investigating Officer proceeded to Bicholim, he had informed the panchas that he could not obtain a search warrant or authorisation as required by law as he had no time to do so and there was a possibility of escape of the applicant or to conceal the drug at a safe place. He, therefore, contends that the Investigating Officer had informed the panchas of the grounds of beliefs before proceeding for the search and the contemporary record in the nature of complaint which was lodged at 1.05 hrs. also confirms the said facts and in the facts and circumstances of the case, there has been sufficient compliance of the law and that non-recording of the same in separate record is merely an irregularity.

According to him, cases of this Court upon which reliance has been placed are distinguishable on facts and in the said cases no record at all had been maintained by the Investigating Officer.

5. The Apex Court in *State of Punjab v. Balbir Singh* : 1994 CriLJ3702 (supra) had laid down that under proviso to S. 42(1) the Investigating Officer is required to record reasons of his belief while carrying out search after sunset and to that extent the provision is mandatory. The consequence of failure to comply with the said requirement would affect the prosecution case and, therefore, vitiates the trial.

6. Similarly, the Apex Court in connection with the requirements under S. 50 of the said Act had held that failure to inform the person to be searched and if such person so requires, failure to take him to a Gazetted Officer or the Magistrate, would amount to non-compliance of S. 50 which is mandatory and thus it would affect the prosecution case and vitiate the trial.

7. In connection with compliance of S. 42(2) it was pointed out by the Apex Court that if there is total non-compliance of the said provision, the same affects the prosecution case.

8. In a later judgment of the Apex Court in *State of Himachal Pradesh v. Pirthi Chand* : 1996 CriLJ1354 the question relating to mandatory requirement of S. 50 of the said Act once again cropped up. In the said case, on receipt of secret information, police raided the house of the accused therein and on search found 1 kilo 15 grams of charas. The learned Sessions Judge and the High Court had discharged the accused in the said case on the ground that provisions of S. 50 of the said Act had not been complied with. The judgment was based upon the law laid down by the Apex Court in the *State of Punjab v. Balbir Singh* : 1994 CriLJ3702 (supra). The Division Bench of the Apex Court in the latter case namely *State of Himachal Pradesh v. Pirthi Chand* : 1996 CriLJ1354 (supra) examined the question of mandatory nature of the requirement under S. 50 of the said Act in the light of various decisions of the Apex Court on the question that even though the search may be illegal the evidence collected i.e. panchanama etc. none-theless would be admissible at the trial and at the stage of filing of the charge-sheet, it cannot be said that there is no evidence and the Magistrate or the Sessions Judge

would be committing illegality to discharge the accused on the ground that S. 50 or other provisions have not been complied with. Therefore, the observations which were made by the Apex Court that non-compliance of proviso to S. 42(1) and S. 50 would vitiate the trial have been explained by the later judgment of the Division Bench of the Apex Court in *State of Himachal Pradesh v. Pirthi Chand* (supra). If the non-compliance of proviso to S. 42(1) or S. 50 would vitiate the trial, then once the said non-compliance was shown, even at the stage when charge-sheet is filed, the accused would be entitled to be discharged on the said count alone. But the Apex Court in *State of Himachal Pradesh v. Pirthi Chand* : 1996 CriLJ1354 (supra) has come to the conclusion :

'At the trial an opportunity would be available to the prosecution to prove that the search was conducted in accordance with law. Even if search is found to be in violation of law, what weight should be given to the evidence collected is yet another question to be gone into. Under these circumstances, the discharging of accused after filing of the charge-sheet on ground that mandatory requirements of Section 50 had not been complied with, was not proper.'

9. In *Steven David Foigolson v. State of Goa* (supra) upon which reliance was placed by learned Advocate Shri J. D'Souza, no record at all had been maintained by the Investigating Officer relating to his ground of belief under proviso to Section 42(1) of the said Act. However, the Court still looked into the Station Diary which was made at 4.30 p.m. and it was held that the entry in Station Diary does not spell out any reason for carrying out search during night hours. It was further pointed out that the learned Public Prosecutor had adequately failed to explain the lapse on the part of the Police and in the circumstances, the appellant was ordered to be released on bail.

10. In *Lawarance D'Souza v. State of Maharashtra* (supra) bail was sought on the basis of the following infirmities which were pointed out by the defence :

'(i) Panchanama was not drawn up at the spot where the Petitioner was apprehended;

(ii) that both the Panchas were under the thumb of the Narcotic Cell having been previously used by them in other cases and were carried all the way from Andheri to Mahim and they have obliged the Police by signing a ready-made Panchanama which is also type-written;

(iii) that provisions of S. 50 of the N.D.P.S. Act have not been followed;

(iv) that the First Information Report has been recorded after the Panchanama was drawn, and,

(v) copy of Panchanama was not given to the Petitioner (accused) on the spot and his signature was not taken.'

In respect of the said submissions the Court found that both the Panchas were regular and professional; details of their having acted previously along with other crime numbers were given; the said facts were not denied by the State and as such it was held that it would not be safe at this stage to act upon the panchanamas and statements of the panchas in the absence of any corroborative material being available. It was further held that the entire panchanama was rendered doubtful. In respect of violation of Section 50, it was held that the circumstances relating to the said violation had not been satisfactorily explained on behalf of the State. The Court also took into consideration the infirmity pointed out in respect of the F.I.R. On the basis of the above mentioned facts, the Court came to the conclusion that the material placed before the Court must be judicially considered for reaching the required satisfaction and in doing so such material which ex facie cannot be legally admitted in evidence, must as of necessity to be excluded from consideration. In view of the above, it was held that ex facie, the material relied upon by the prosecution is not such as the Court can reasonably be satisfied that the accused has been shown prima facie to have committed the alleged offence.

11. I have already referred to the observations of the Apex Court in *State of Himachal Pradesh v. Shri Pirthi Chand* : 1996 CriLJ1354 (supra) that even if the search is illegal, it will not affect the validity of seizure and further investigation of the authorities or the validity of the trial.

12. The facts and circumstances under which bail was granted by this Court in *Steven David Foigolson v. State of Goa (supra)* and in *Lawarance D'Souza v. State of Maharashtra (supra)* are clearly distinguishable and cannot help the cause of the applicant before me.

13. In the case under consideration, Deepak alias Vaikunt Vinayak Gaonkar was arrested by the Investigating Officer for possession of 7 Kgs. of charas on 25-1-96 at 8.30 p.m. The said Deepak, on interrogation, stated that he had purchased the said charas from one Badlu Maurya namely the applicant who was residing at Bhailipeth, Bicholim and that he would point out the said house on rent with the applicant. The Investigating Officer promptly recorded the said statement of Deepak and wrote letter to Dy. S.P., A.N.C. at 8.40 p.m. informing him of the said facts and that he was proceeding for raid to Bicholim. This letter, as can be seen from the endorsement of Dy. S.P., A.N.C., was received on 25-1-96 itself. This letter according to the I.O. had been despatched to the Dy. S.P., A.N.C., Panaji before he left for the raid. With the arrest of Deepak who is alleged to have purchased charas from the applicant, there would be reasonable apprehension that if the search was not done immediately, the applicant would escape or conceal the drug in question. It is pertinent to note that before proceeding for the raid at the house of the applicant, the Investigating Officer had informed the panchas that he could not obtain search warrant or authorisation as required by law as there was no time to do so and there was possibility of escape of the applicant or of concealing the drug at safe place. It is no doubt true that this ground of belief should have been recorded by the Investigating Officer separately, but the same was recorded only in the panchanama which started at 9.35 p.m.

14. It has been pointed out by the Apex Court in *State of Punjab v. Balbir Singh : 1994 CriLJ3702 (supra)* that the Legislature while keeping in view the menace of illicit drug trafficking deemed it fit to provide for corresponding safeguards to check the misuse of power thus conferred so that any harm to the innocent persons is avoided and to minimise the allegations of planting or fabricating by the prosecution.

15. In the case under consideration the information in question was revealed by Deepak from whose possession 7 kgs. of charas was recovered and who informed the Police that he had purchased the said charas from the applicant. The Investigating Officer promptly recorded the said statement of Deepak and forwarded the said information in letter to Dy. S.P., A.N.C., Panaji at 8.40 p.m. and the same was received by Dy. S.P., A.N.C., on the same day. In addition, the Investigating Officer had also informed Panchas prior to proceeding for raid as per panchanama dated 25-1-96 which commenced at 9.35 p.m. that he could not obtain search warrant or authorisation as required by law as he had no time to do so and there was a possibility of the applicant escaping or concealing the drug at a safe place. This fact, though recorded in the panchanama is stated to have been told to the panchas prior to the police party starting for the raid. This contemporary record of informing the panchas before the raid cannot be outright rejected at this stage.

16. In addition the complaint was lodged with the Police Station at 1.05 hrs. on 26-1-96 which is again contemporary record in support of I.O.'s contention that the panchas were duly informed of the grounds of belief before the raid started. Copy of such complaint is sent to the Magistrate and superior officers as per law. This evidence, which is available at this stage would prima facie rule out the possibility of manipulation or planting which is required to be safeguard in such matters. Even if the search was illegal, it would not affect the seizure and further investigation of the authorities or the validity of the trial and such recovery is admissible in evidence and can be proved against the accused.

17. An important question which has also to be examined in such cases is whether the non-compliance was deliberate or due to lack of time which has been pointed out by the Apex Court in *State of Himachal Pradesh v. Shri Pirthi Chand* : 1996 CriLJ1354 (supra). On the basis of material available, prima facie, I am of the opinion, that there does not appear to be deliberate failure, but the lapse appears to be on account of lack of time which is supported by the fact that the Investigating Officer promptly raided the house of the applicant within an hour of the receipt of the information of the contraband.

18. In the light of the evidence on record, it cannot be said at this stage that there are reasonable grounds for believing that the accused is not guilty of the offence in question. Accordingly, I do not consider this to be a fit case for the release of the applicant on bail.

19. Before concluding, I would like to point out that various aspects connected with the arguments advanced by learned Advocate Shri J. D'Souza had to be necessarily touched in this order which, otherwise, I would have refrained from dealing, yet I would like to make it clear that any observation made in this order shall not in any manner influence the Special Judge while dealing with the case on merits in respect of the various requirements which are to be complied with by the Police and the Special Judge would be free to draw his own conclusions.

20. The bail application accordingly stands dismissed.

21. Application dismissed.

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