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Court : Mumbai

Decided On : Jul-19-1996

Reported in : 1997CriLJ2028

Judge : R.M.S Khandeparkar and ; T.K. Chandrashekhara Das, JJ.

Acts : ndian Evidence Act - Sections 8 and 27; Narcotic drugs psycho. Sub. Act - Sections 20, 42, 43 and 50

Appeal No. : Criminal Appeal No. 30 of 1995

Appellant : Milan Sarcanski

Respondent : The State Through Its Special P.P. Adv. Bhope

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

Advocate for Pet/Ap. : Lalit Chari, Senior Adv., ;Gopal Kanekar and ;Francis Saldanha, Advs.

Judgement :

Chandrashekhara Das, J.

1. The appellant is an accused in Special Criminal Case No. 6/95 on the file of the Narcotic Drugs and Psychotropic Substances Court of Mapusa. He challenges the convictions and sentence passed by the Special Judge under Section 20(b)(ii) of

the Narcotic Drugs and Psychotropic Substances Act, 1985, whereby the appellant was sentenced to undergo Rigorous Imprisonment for ten years and to pay a fine of Rs. 1,00,000/-, or in default, to suffer Rigorous Imprisonment for two years.

2. According to the prosecutor, on 5th January, 1995, a raiding party of the Anti-Narcotic Cell, Panaji, led by Mr. G. M. Jadhav, Police Inspector, was a making a random check in Calangute area. The raiding party also consisted of one Dy. S. P. Shri Shukla. On information received, the raiding party went to the house where the accused was staying. Admittedly, it was at 8'O clock in the night. When P. I. Jadhav entered the verandah of the house where the appellant was staying, it was open. He knocked at the door and in response, the appellant, who is the co-owner came to the door. P. I. Jadhav introduced himself and the other members of the raiding party including the panchas and also Shri I. D. Shukla, Dy. S.P. of Anti-Narcotic Cell, as Gazetted Officer and told the appellant that they wanted to search the person and the house of the appellant. He also told the appellant, that he could be searched in the presence of a Magistrate or Gazetted Officer and also informed him that Mr. Shukla was a Gazetted Officer. Appellant agreed to be searched in the presence of Mr. Shukla. The raiding party then searched the person and recovered charas from the bag which was worn by the appellant at that time and it weighed 12 gms. Sample was taken and sealed in the presence of panchas as per the rules.

3. It is the case of the prosecution that on asking the appellant whether any more charas were kept there in the house, the appellant took the raiding party to the adjacent room and there they found under the cot, two bundles. One bundle which was wrapped with cloth contained 365 gms. and another lot was found in an aluminium container of the appellant which contained 640 gms. of charas. Samples also were taken, packed and sealed in conformity with law. These recoveries are marked as S. 1, S. 2 and S. 3 respectively. After following the formalities the raiding party took custody of all these articles. The samples were sent for analysis and the Chemical Analyser of the Government Laboratory confirmed that the samples contained charas.

4. The prosecution has examined six witnesses in support of its case. P.W. 1 is Mahesh Kaisare, a Junior Scientific Officer in the Food and Drugs Laboratory, who had analysed the samples. P.W. 2 is Shri Suhas Halarnkar, a panch witness, P.W. 3 is Carmine D'Souza, who is said to be the owner of the house where the appellant was staying, P.W. 4 is Shri Manohar D. Joshi, Scientific Assistant in the C.I.D. Crime Branch, Panaji, who forwarded the samples to the Chemical Analyser, P.W. 5 is Shri Gopal Jadhav, the Investigating Officer and P.W. 6 is Shri Kiran Paduwal, who has partly investigated the case. The lower court has considered the evidence of the witnesses and found the appellant guilty.

5. The main defence taken on behalf of the appellant before the lower court was that the search was made after sunset and there is neither compliance of the proviso to S. 42 of Narcotic Drugs and Psychotropic Substances Act, 1985, nor the place is a public place to attract the Explanation to S. 43 of the Act. The lower court has found that the house is a public place which was let out to tourists and the appellant is also a tourist. The lower court has also found that that recovery from the person of the appellant is valid. The lower court also relied upon the recovery made from the room which was lying under the cot, holding that the room was in his exclusive possession. The main defence put forward by the appellant before the court below was that as far as the recovery effected from the house is concerned, the room from where the contraband articles were recovered is in possession of another lady called Tamara, as spoken by P.W. 3, the landlady. However, the court below has discarded the evidence of P.W. 3 and found that the room was in possession of the appellant and therefore, the recovery is attributable to the appellant. It is on these premises that the Court below has found the appellant guilty.

6. The learned counsel Mr. Chari, appearing for the appellant, argued elaborately and summarised his arguments as follows :

Firstly, he contended that the recovery made from the person of the appellant has not been proved; secondly, since the search was made after sunset, and the premises which were searched are not a public place, there is violation of the proviso of S. 42 of the Act, which is said to be mandatory. Therefore, the entire

trial is vitiated. Thirdly, Mr. Chari has submitted that there is violation of S. 50 of the Act as there was no evidence to establish that the appellant was offered to be searched in the presence of a Gazetted Officer or Magistrate. Therefore, he submits that since S. 50 of the Act is mandatory, violation of the provision vitiates the trial.

7. We heard learned Public Prosecutor Mr. Bhobe at length on all these points. Several decisions were cited before us in support of the arguments of the counsel for both parties. However, we do not propose to discuss all these points in this judgment because we think that this appeal can be disposed of on the first point itself.

8. Mr. Chari contended that the recovery from the person of the accused has not been proved as is established by the evidence of P.W. 2 who is a panch. He brought to our attention the statement made by P.W. 2 in the examination-in-chief. When the samples packed were shown to the witness, he identified only two packets of samples, i.e., M.O. 1-B and M.O. 1-C (S. 2 and S. 3 respectively). These packets, S. 2 and S. 3 are contraband recovered from the room. Regarding recovery marked M.O. 1-A (S. 1), which relates to the recovery from the person of the accused/appellant, P.W. says thus :

'I say that the substance found in M.O. 1 does not look to be similar to the one attached from the bag since that substance was elongated and the present substance is flat.'

According to Mr. Chari, this statement of P.W. 2 has completely destroyed the case of the prosecution about the recovery from the person of the accused. The cumbersome procedure prescribed regarding the search and seizure in the Narcotic Drugs and Psychotropic Substances Act is to ensure that the recovery and the search have to be proved before a Court of law by examining the samples and the witness who identified it at the time of the seizure. The very basic principle of proof of such contraband article has not been complied with in this case. We see considerable force in the argument of Mr. Chari.

9. The recovery of the contraband goods from the person of the accused is to be proved by the prosecution as per the procedure prescribed by law. The procedure involves examination of panch witnesses particularly for the purpose of identification of the contraband goods recovered in the course of investigation. In fact panchas play a vital role in the matter of establishing the link between the contraband goods recovered and the accused, who is charged of the offence of possessing the contraband goods. Any failure on the part of the prosecution to establish the link between the articles alleged to have been seized in the course of investigation for having been found in possession of the accused and those produced before the Court for the purpose of identification by the panchas, who were stated to be present at the time of seizure of those articles, can be fatal to establish the charges against the accused in respect of the possession of the contraband goods. In the instant case the pancha has in fact failed to identify the contraband goods which were alleged to have been recovered from the person of the accused. As already pointed out, P.W. 2 the pancha has clearly stated that the substance shown to him does not look to be similar to the one recovered from the bag which was carried by the accused. In other words the item which was shown to the pancha as one which was seized from the bag carried by the accused on 5th January, 1995, was, in fact, not the one seized from the bag carried by the accused on the said day but was a different one. Besides, the statement of P.W. 2 has to be read with two other statements of the same witness. P.W. 2 has clearly identified in those statements the articles which were seized in the course of investigation from another room in the same house and which was stated to be in occupation of Tamara. Therefore, in view of failure on the part of the prosecution to establish the link between the accused and the goods alleged to have been recovered from the person of the accused, the recovery from the person of the appellant has not been proved and the judgment of the lower Court in that respect is certainly liable to be set aside.

10. Indeed Shri Bhobe, the learned Public Prosecutor, made fervent attempt to convince us that the statement of P.W. 2 cannot be read as failure to identify the substance recovered from the accused. He contended that the witnesses had spoken only about the physical nature of the substance when he said that the substance does not look to be similar to the one attached from the bag of the

accused. However, we are not convinced by this statement of the learned Public Prosecutor. As pointed out earlier the witness has clearly identified the two other items which are said to be recovered from another room in the same house on the same occasion. The witness having clearly identified those two items and having failed to identify the item which is alleged to have been recovered from the bag carried by the appellant, we are left with no option then to conclude that the item which has been recovered from the bag of the accused has not been identified and, therefore, the recovery from the person of the accused has not been established by the prosecution. It is not the case of the prosecution that the witness was hostile, otherwise the prosecution would have declared the witness to be hostile. Besides, there being no other material placed on record by the prosecution to establish the link between the substance produced before the Court as having been recovered from the person of the accused and one which was actually recovered from the person of the accused on 5th January, 1995, the only conclusion that can be drawn is that the prosecution has failed to establish the recovery from the person of the accused. So long as the contraband alleged to have been recovered from the appellant could not be identified by the panch witness, it cannot be said that the recovery of the item from the appellant has been proved and, therefore, it cannot be said that the appellant has committed an offence punishable under S. 20(b)(ii) of the Narcotic Drugs and Psychotropic Substances Act, 1985.

11. Then remains the recovery from the room. Even though much has been argued about recovery bearing No. M.O. 1-B and M.O. 1-C, in the light of S. 27 of the Evidence Act, we do not think that it is necessary in this case to go into that aspect because even the lower Court has not considered, rightly, the recovery from the room as one made under S. 27 of the Evidence Act and in the nature of things and in the light of evidence adduced in this case we fully endorse the view of the lower Court that the recovery will not come under S. 27 of the Evidence Act. But the lower Court brought it under S. 8 of the Evidence Act. Assuming that such an approach is correct, what has been established by the prosecution is that some contraband was found under the cot in the adjoining room of the said house and the existence of the said contraband goods in the said room was informed by the appellant. However, that by itself does not prove that the contraband goods were

either belonging to the appellant or the appellant was in possession thereof. The prosecution ought to have proved that the adjoining room in which the said contraband was found under the cot was in exclusive possession of the appellant and that the appellant had no explanation to give as to how those contraband goods came to be placed in the said room without his knowledge. In the light of the statement of P.W. 3, the landlady of the house, the said adjoining room wherein the contraband goods were found in the house was leased out to one lady called Tamara and the said Tamara was staying therein from January to April of the year 1995. In other words, the room in question was in occupation of the lady known as Tamara. Admittedly, the said Tamara has never been accused in the present case nor has been cited as a witness for the prosecution. It is also not the case of the prosecution that the appellant had easy access to the said room and that the appellant was in possession of the said contraband goods before being placed in the said room. In the absence of any proof regarding the link between the appellant and the articles found in the said room, the alleged recovery of the said contraband goods from the said room cannot be in any manner attributed to the appellant. There is absolutely no evidence on record that the appellant was in exclusive possession of the said room. On the contrary, as already pointed out above, the room was in occupation of the lady called Tamara. Indeed in this context the learned counsel for the appellant did seek support from the decision of the Division Bench of this Court to which one of us was a party, that is, in 'Revatram Ratanchand Thakur v. State of Goa' reported in 1995 (3) Crimes 633. In paragraph 17 of the said decision this Court observed thus :-

'Here, according to P.W. 2, the Police Officer was asking him whether any charas was hidden and the accused No. 1 was to show place where the charas were hidden, but this will not attribute to the guilt of the accused in possessing the charas. The accused might have the knowledge where the charas was hidden; that always does not mean that the hiding was done by him. In order to fasten liability under S. 20(b)(ii) of the Act possession of the charas has to be proved positively and mere knowledge of the person or the place where the charas could be found cannot be equated with the possession in order to come under the ambit of S. 20(b)(ii) of the Act.'

Therefore, the contraband M.O. 1-B and M.O. 1-C cannot be said to be recovered from the possession of the appellant and we have to hold that the prosecution has not proved the guilt of the appellant on that score also. We have already found that the recovery from the person of the appellant has not been established.

11A. In view of this, we allow the appeal. The judgment of conviction and sentence against the appellant passed by the Special Judge of the Narcotic Drugs and Psychotropic Substances Court, Mapusa, dated 10th October, 1995, is set aside. The appellant stands acquitted of the offence under Section 20(b)(ii) of the Narcotic Drugs and Psychotropic Substances Act, 1985. The appellant is directed to be released forthwith if he is not required in any other case.

12. Appeal allowed.

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