

Shri Ranjan Das Vs. State

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Court : Mumbai

Decided On : Feb-17-1988

Reported in : 1988(3)BomCR302

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

Acts : [Narcotic Drugs and Psychotropic Substances Act, 1985](#) - Sections 21;
Evidence Act - Sections 27

Appeal No. : Criminal Appeal No. 8 of 1988

Appellant : Shri Ranjan Das

Respondent : State

Advocate for Def. : G.U. Bhobe, P.P.

Advocate for Pet/Ap. : S.K. Kakodkar, S.A. and ; S.R. Rivoncar, Adv.

Judgement :

G.F. Couto, J.

1. The appellant is a businessman running a Hotel and Restaurant under the name and style 'Sea Wolf', at Calangute. He has been convicted for an offence punishable under section 21 of the [Narcotic Drugs and Psychotropic Substances Act, 1985](#), and sentenced to undergo 10 years of Rigorous Imprisonment and to

pay a fine of One lakh of Rupees and, in default of payment, to undergo a further period of 1 year of Rigorous Imprisonment.

2. The facts that led to the above conviction and sentence are simple and may be stated: On an alleged information, the Assistant Superintendent of Police, Mapusa, Shri Dilip Kumar, proceeded with a police party to Calangute in order to lay a trap to the appellant herein, who according to the said information, was trafficking in narcotics. This happened on 26th July, 1986, at about 4.00 P.M. On reaching the police station of Calangute, the P.S.I. Tari, was directed to bring two panchas. On compliance with this direction, two panchas, namely, one Gowardan Sawal alias Aba Sawal and one Ravi Namdev Nagvekar were bought to the place and, thereafter, 500 rupees were handed over to the pancha Sawal who was directed to approach the appellant and to purchase from him some brown sugar. The said 500 rupees were in 100 rupees notes and were all initialled by P.S.I. Tari. Sawal was instructed to make a signal to the police party after the purchase of the narcotics from the appellant. Thereafter, the police party left the police station of Calangute and proceeded to 'Sea Wolf' Hotel. They stopped at a distance of about 50 metres from the said Hotel and Sawal proceeded further and entered the same Restaurant. After some time, he came out and made a signal to the police party who immediately went to the Hotel. The appellant and his wife obstructed the police party and did not allow them to enter the premises of the Hotel. The Assistant Superintendent of Police, Dilip Kumar, identified himself and, in the meanwhile, the original accused No. 2, i.e. the wife of the appellant, allegedly slapped P.C. Punaji Gauns and further, pushed aside Dilip Kumar and rushed to her kitchen and from there went to the first floor.

3. According to the police Sawal produced a small polythene bag saying that it contained 5 grams of white sugar, that is to say, heroin and that he had purchased it from the appellant since brown sugar was not available. Thereafter, the police party succeeded in persuading the appellant to allow them to search the place. The appellant persuaded his wife to open a door in the first floor and the police party proceeded thereafter to search the premises of the Hotel. Five Hundred rupees were found under a mattress in the bed-room of the appellant. These 500 rupees were bearing the initials of P.S.I. Tari and were identified by Sawal as

being the money handed over by him to the appellant. The appellant and his wife were thereafter arrested and taken to the police station.

4. It is further the case of the prosecution, that, on interrogation, the appellant disclosed that there was more heroin kept in the Hotel and that he was prepared to show the place where the said heroin had been concealed. Accordingly, panchas were called and the appellant stated that heroin has been kept in the room No. 18 in the Hotel 'Sea Wolf'. The police party went thereafter with the appellant and the panchas to the said Hotel and in particular, to the room No. 18. Once there, the appellant put a chair on the top of a bed and climbing up the said chair, removed from a cavity in the ceiling where the fan has been fixed, 9 packets of polythene bags, each of them containing 5 grams of heroin.

5. On basis of all these facts, the learned Assistant Sessions Judge charged the accused of having in possession and selling narcotics and, finally convicted the appellant under section 21 of the [Narcotic Drugs and Psychotropic Substances Act, 1985](#) by his judgment dated 28th January, 1988.

6. The appellant assails his conviction and consequent sentence, mainly on two grounds. He first contends that the charge framed against him is not clear and it is difficult to find out whether he had been charged for the illegal possession of narcotics or for the selling of such prohibited substances. Secondly, it is his case that the evidence adduced by the prosecution does not, in any manner, warrant his conviction since the same evidence is rather doubtful.

7. Elaborating the above grounds, Mr. S.K. Kakodkar, the learned Counsel appearing for the appellant, began to invite our attention to the charge framed by the Assistant Sessions Judge wherein it is stated that the appellant has been found on 26th July, 1986, at about 5.00 p.m., to possess/ sell about 50 grams of heroin in contravention of section 8 of the Narcotic Drugs and Psychotropic Substances Act. However, after having charged the appellant and his wife in this rather confusing manner, in his judgment, the learned Judge addressed himself merely to the question of illegal possession of heroin. He did not address himself at all to the question so the sale of the said drug. In doing so, manifestly, the learned Assistant Sessions Judge has prejudiced the appellant in his defence,

since he could not know with precision what was the charge made against him. The learned Counsel thereafter took us through the evidence and he first submitted that the evidence of the panch witness Sawal (P.W. 4) is not reliable evidence, for several reasons. The said witness is admittedly, a drug addict and a friend of the police officers. That apart, Sawal was not searched before going to purchase the heroin from the appellant. Thirdly, the prosecution has failed to establish the link between the appellant and the heroin found in possession of Sawal when the police party went to the Hotel. As regards the recovery of 9 polythene packets, purportedly under section 27 of the Evidence Act, the learned Counsel urged that the recovery cannot be said to be made under section 27 of the Evidence Act, since it is clear from the evidence of the pancha Vishwanath Sharma (P.W. 3) that the appellant had not stated that he had concealed any heroin or prohibited drug in the said room. According to the said Sharma, the appellant stated that there were some goods kept in his hotel and that he would point out those goods, without specifying what kind of goods were the said goods and that he had concealed them. The learned Counsel then, placing reliance in the decision of the Privy Council in Pulukuri Kottava v. Emperor A.I.R. 1947 P.C. 67 and in Mohmed Inayatullah v. The State of Maharashtra, : 1976 CriLJ481 , submitted that the alleged recovery of 9 packets of heroin from the room No. 18 of the Hotel 'sea Wolf' is not a recovery under section 27 of the Evidence Act and, therefore, cannot justify at all the conviction of the appellant. He further contended that the evidence of the Chemical Analyser is not reliable, for he did not state what was the percentage of heroin found in the packets sent to him by the police for analysis. Finally, the learned Counsel also submitted that the police had conducted the search at the 'Sea Wool' premises but had failed to comply with the provisions of section 165 of Criminal Procedure Code and to send a copy of the search report to the Magistrate.

8. The first contention of the learned Counsel should not detain us long, for obviously, there is not much merit in it. No doubt, the learned Assistant Sessions Judge had charged the appellant and his wife of having been found to possess/sell about 50 grams of white sugar in contravention with section 8 of the [Narcotic Drugs and Psychotropic Substances Act, 1985](#). It is also true that while delivering his judgment the learned judge recorded in paragraph 5 that the only point arising

for his determination was whether the prosecution has proved that the accused or either of them, had been found in possession of 50 grams of heroin without any valid documents. From the above facts, it would appear at the first glance that the learned Counsel is correct in saying that the charge was not clear and, therefore, the appellant might have been prejudiced in advancing his defence. However, going through the evidence, and the cross-examination of the prosecution witnesses, it becomes clear that the appellant has understood well the charge made against him which could be divided in two parts, the first being of the sale of 5 grams of heroin to Sawal, and the second, of possession of 9 packets of heroin, each of them weighing 5 grams, which were allegedly recovered under section 27 of the Evidence Act. This being the position, it is obvious that no prejudice was accused to the appellant on that count and, therefore, the first contention advanced on behalf of the appellant is not to be accepted.

9. Coming now to the second submission, namely, that the evidence adduced by the prosecution is not sufficient to warrant the conviction of the appellant, we are of the firm view that the learned Counsel is correct in his submission. We have already mentioned that the prosecution case can be divided in two parts, the first being as regards the sale of 5 grams of heroin to Sawal and the second, the possession of 9 packets of heroin, each weighing 5 grams, under section 27 of the Evidence Act. We will proceed to deal with these two aspects of the case.

10. As regards the sale of 5 grams of heroin to Sawal, the prosecution evidence is essentially based on the statement given by Sawal. It is the case of the prosecution that Sawal was sent as a punter to purchase heroin or brown sugar from the appellant. He was handed over 500 rupees, in 100 rupees notes, each of them initialled by P.S.I. Tari. He went to the Hotel 'Sea Wolf' and after purchasing 5 grams of heroin, came out and made a signal to the police party. The police party constituted by Punaji Gauns, P.S.I. Tari and Dilip Kumar entered the Hotel. The Sawal produced a polythene packet containing heroin. The said packet was open and not sealed. The said Sawal stated that the appellant had sold him the said packet and he had been paid 500 rupees. The prosecution evidence also is to the effect that the appellant and his wife obstructed the entry of the police and further, that the wife of the appellant assaulted the P.C. Gauns and after pushing

aside the Assistant Superintendent of Police, Dilip Kumar, rushed to the first floor through the kitchen and, thereafter, locked herself inside. It is further the prosecution case that after some persuasion, the appellant allowed the search of the building premises, and on search, 500 rupees initialled by Tari had been recovered from under a matter in the bed-room of the appellant. Further search was not successful and nothing incriminating was recovered.

11. Now, it has been argued by Mr. Bhobe, the learned public prosecutor, that the fact that Sawal was a drug addict is not sufficient to discard his evidence and the same should be looked into in its merits. Sawal stated that he was a drug addict but he had left it for some time. We agree that his fact alone is not sufficient to discard the evidence of Sawal and even, we think that this kind of witness was necessary to be chosen as a punter because, otherwise, in all probability, the appellant would be suspicious and would not sell narcotics to a person not known to him. But, if this is true, we also are alive to the need of being careful in accepting the evidence of such a witness. His evidence has to be analysed with due care and see if it stands the normal tests. Applying them, we find that the prosecution has miserably failed to establish the link between the heroin found in his possession and the appellant. In fact, there is no eye witness to depose to the alleged sale of the heroin and further there is a damaging admission made by Sawal that he had opened the packet and rolled a cigarette only to impress the appellant. We fail to understand the need of such rolling a cigarette with heroin when everything was a trap the police party was available nearby. The opening of the polythene packet and the rolling of cigarette creates suspicion that Sawal was still an addict and, therefore, the finding of such a polythene bag in his possession was possible. That apart, it has come in the evidence of Punaji Gauns that he did not know whether Sawal had been searched before going to purchase the heroin. In the evidence of Dilip Kumar and Tari also there is no reference to such search. Although in cross-examination Sawal stated that he had been searched but he did not say in what manner and what was in his body. Therefore, one does not know whether Sawal had or not in his possession the polythene packet with heroin when he entered the 'Sea Wolf' Hotel.

12. In addition, there is another aspect that we may point out. It has been alleged by the prosecution that 500 rupees initialled by Tari had been found under the mattress of the appellant in his bed-room. However, the prosecution has not brought any reliable evidence to show that the said amount of money had been kept in that place by the appellant. One fails to understand as to why the prosecution has not treated the said notes with some chemical in order to prove later on the handling thereof by the appellant by some signs in his body or hands. It is well known that the normal practice of the police is to treat money with phenolphthalein and this is the normal and ordinary procedure. One also fails to understand why this test was not at all used in the present case. No explanation therefore came forward and as such, in the circumstances, we are of the view that the evidence of the witness Sawal is unreliable and not safe to base on it a conviction.

13. As regards the second limb of the prosecution charge against the appellant, i.e. that he was found in possession of narcotics, we may recall that the whole case of the prosecution is based on the evidence of the panch witness Vishwanath Sharma (P.W. 3.). Vishwanath Sharma is a panch witness and he stated that on 27th July, 1986, at about 1.00 p.m. he was passing by the side of the Mapusa Police Station and he was at that time called to stand as a panch. The Assistant Superintendent of Police, Dilip Kumar, the P.S.I. of Calangute Police Station and some other policemen were present as well as another panch and the appellant. He deposed that the police asked him to hear what the appellant was about to say. The appellant stated that there were some goods kept in his hotel and that he would point out the said goods. A panchanama was recorded and, thereafter, the police party left the Mapusa Police Station in company of the panchas and of the appellant. Once there, they proceeded to the Restaurant indicated by the appellant which is situated a little beyond Calangute. The police party and the panchas were taken to the first floor of the said Restaurant and there, the appellant removed 9 packets from a ceiling fan. The said packets were of polythene paper and each of them was weighing 5 grams. They were white in colour. In the panchanama Exhibit P.W. 3/A-which purports to be a panchanama of discovery of the said packets of heroin made under section 27 of the Evidence Act, it is recorded that the appellant disclosed that he has been arrested in connection with 5 grams of

white sugar herein and on further questioning he had disclosed that he was going to show the place in his house where he had hidden in a room No. 18, in the cavity of the fan attached to the ceiling. It is clear from the above that there is a basic difference between what the witness stated in Court and what is recorded in the panchanama. In Court and that is the substantial evidence, the witness has stated merely that the appellant has stated that some goods had been kept in his Hotel and that he was going to point them out. In the panchanama there is something in addition, namely, that he had hidden. In the room No. 18 and in the cavity of the ceiling where the fan was attached, the heroin. Therefore, it is clear that a material portion of the information is entirely missing in the evidence given in Court, namely, that the appellant himself had hidden some goods or narcotics in the Room No. 18. Now as, observed by their Lordships, of the Privy Council in *Pulukuri Kottaya and others v. Emperor*, it is fallacious to treat a fact discovered within the section as equivalent to the object produced. The fact discovered embraces the place from where the object produced, and the knowledge of the accused as to this and the information given must relate distinctly to this fact. Information as to the past user or the past history of the object produced is not related to its discovery in the setting in which it is discovered. Their Lordships added. Similarly information supplied by a person in custody that he will produce a knife concealed in the roof of his house does not lead to the discovery of the knife as knives were discovered many years ago. It leads merely to the discovery of the fact that the knife is concealed in the house of the informant to his knowledge, and if the knife is proved to have been used in the commission of the offence, the fact discovered is very relevant. This view was also expressed by their Lordships of the Supreme Court in *Mohammed Inayatullah's case*. In fact, the Supreme Court observed that section 27 of the Eviction Act is in the nature of an exception to the preceding sections, particularly, 25 and 26. The first condition necessary for bringing the section 27 into operation is the discovery of a fact, albeit a relevant fact, in consequence of the information received from a person accused of an offence. The second is that the discovery of such fact must be disposed to. The third is that at the time of the receipt of the information the accused must be in police custody and the last but the most important condition is that only so much of the information as relates distinctly to the fact thereby discovered is admissible.

The rest of the information has to be excluded. It follows from the above decisions of the Privy Council and of the Supreme Court that a discovery to be held to be under section 27 of the Evidence Act has to satisfy some requisites, namely, that the discovery is made by virtue and exclusively as a result of the information given by the accused person. It appears to us that in the facts and circumstances of this case, it is rather difficult to accept the submission of the learned Public Prosecutor that the alleged recovery of 9 packets of heroin from the fan in the Room No. 18 of the 'Sea Wolf' Restaurant is a discovery made under section 27 of the Evidence Act. First of all, we have to bear in mind that it is the case of the prosecution itself that, after the police party entered the premises of the said Hotel, a search was conducted and with the exception of 5 notes of 100 rupees each recovered from under the mattress in the bed-room of the appellant, no other incriminating article was discovered. One has to expect that a thorough search was conducted by the police, especially in the background that the witness Sawal specifically stated that he informed the police that there was more heroin weighing about 1/2 Kg. in the premises. This statement of the witness Sawal was corroborated not only by the witness Punaji Gauns but also by the Assistant Superintendent of police, Dilip Kumar. In these circumstances, if after a superficial and routine search such heroin was not found, it was the bounden duty of the Police Officers to conduct a very careful and thorough search which, in all probabilities, was not made. We have also to bear in mind that it is the case of the prosecution itself that soon after the police party entered the premises, the appellant and his wife obstructed their entry and the wife of the appellant suddenly assaulted the witness Punaji Gauns and pushed aside the Assistant Superintendent of police, Dilip Kumar, dashed to the first floor through the kitchen and thereafter, locked herself in the said floor. This indicates that, in all probability, if there was more heroin, the wife of the appellant must have hidden it in the first floor. It is also the case of the prosecution that soon after the search was conducted, the appellant and his wife had been arrested and taken to the police station. They were interrogated there and it appears that only on the next day, at about 1.00 p.m., panchanama of the discovery under section 27 of the Evidence Act began to be recorded. Vishwanath Sharma had, in fact, stated that he was passing by the police station at Mapusa, at about 1.00 p.m. on 27th July, 1986, when he was called to stand as a panch. This

means that right from the time of the search made at about 5.00 p.m. on 26th July, 1986, to the time the police party came next day to the premises, there was no watch kept on the premises and anybody else could have concealed the packets of heroin in the ceiling cavity where the fan is attached. We may also point out that it is the prosecution case itself that beside the appellant and his wife, also his sister-in-law and a servant were present and one of the witnesses went even to the extent of saying that another man was also in the premises. So, in the circumstances, the prosecution has not established beyond any doubt that the appellant himself has kept the said heroin in the cavity of the ceiling above mentioned. It is true that Mr. Bhobe argued that it is relevant to be noticed that the appellant knew that some heroin had been kept hidden on the cavity of the ceiling where the fan has been attached. There is no sound explanation brought to explain this knowledge, but the fact remains that, at the most, the statement made by the appellant will go to show that he knew that some heroin had been concealed in the said cavity but this does not mean that the said heroin was belonging to him and was in his possession. In the circumstances, the benefit of the doubt is to be given to the appellant.

14. In the view we have taken as regards the two aspects of the charge made against the appellant, it is not necessary for us to deal with the other submissions of Mr. Kakodkar. We may, however, point out that the investigation of this case is highly defective and it is rather surprising that the police had not shown sufficient care in laying the trap to the appellant and also, even in recording the statements of the witnesses. It is very symptomatic to refer to the circumstances that the statement of the Assistant Superintendent of Police was recorded by P.S.I. Tari on 26th July, 1986, and inspite of this, surprisingly, a reference is made to what happened on 27th of the same month, namely, that the appellant had stated that he would show the place where he had hidden some narcotics. The investigation is made in such a manner that a doubt is created about the seriousness of the whole case. We hope and we trust that, in future, the police will be more careful in investigating the cases, especially in cases involving trafficking of drugs which are, by nature, very serious. Although we did not deal with the submission of Mr. Kakodkar as regards the validity of the report of the Chemical Analyser as we felt that was not necessary in the present case, we also feel it proper that the

Chemical Analyser should always mention the percentage of the narcotic found by him as well as the test conducted to arrive at his findings.

15. The net result, therefore, is that this appeal succeeds and, consequently, the conviction of the appellant under section 21 of the [Narcotic Drugs and Psychotropic Substances Act, 1985](#), and the consequent sentence passed against him are hereby quashed and set aside. The appellant to be set at liberty forthwith if not required in any other case. A copy of this judgment to be sent to the Inspector General of Police, for necessary action.

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