Peter Diplinger Vs. State of Goa

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Court : Mumbai

Decided On : Nov-28-1997

Reported in : 1998BomCR(Cri)491

Judge : R.M. Lodha and; R.K. Batta, JJ.

Acts : Narcotic Drugs and Psychotropic Substances Act, 1985 - Sections 20 and 50; Evidence Act, 1872 - Sections 3, 8, 9, 59 and 61; Code of Criminal Procedure (CrPC) , 1973 - Sections 161;

Appeal No. : Criminal Appeal No. 12 of 1997

Appellant : Peter Diplinger

Respondent : State of Goa

Advocate for Def. : H.R. Bharne, P.P.

Advocate for Pet/Ap. : Lalit Chari, S.A. and ;J.P. D'Souza, Adv.

Judgement :
ORDER

R.M. Lodha, J.

1. Sense and soundness of the judgment and order of conviction and sentence passed on 19-2-97 by Special Judge, N.D.P.S. Court, Mapusa, convicting the

accused/appellant for the offence punishable under section 20(b)(ii) of Narcotic Drugs and Psychotropic Substances Act, 1985 and sentencing him to suffer rigorous imprisonment for ten years and to pay a fine of Rupees one lakh and in default to suffer rigorous imprisonment for two years is under challenge in this criminal appeal.

2. The gravamen of the charge levelled against the appellant/accused is that on or about 13th December, 1995 at Villa Fatima Beach Resort, Baga, Calangute, he was found possessing 1 kg. 7 grams of Charas without possessing legal documents to justify its possession and thereby the accused committed offence punishable under section 20(b)(ii) of the N.D.P.S. Act.

3. In brief and to the extent it is necessary, the prosecution story is that on 13-12-95 at about 17.25 hours Shirish Thorat (P.W. 6), P.S.I., while he was present at the Anti Narcotic Cell Police Station, Panaji headquarters, received information that one foreigner residing in Room No. 10-A of Villa Fatima Bench Resort was dealing in narcotic drugs. Shri Thorat accordingly reduced the information in writing; forwarded it to Dy.S.P; secured the presence of two panchas namely Kariyapa Murgod (P.W. 3) and Deepak Dattaram Dessai; and left to raid the aforesaid place along with the raiding party in the police jeep and he went on motor cycle. After reaching the hotel, the raiding party went to Room No. 10-A and upon the door of the said room being knocked by P.W. 6, the accused Peter opened the door. P.W. 6 informed the accused that he, along with the raiding party, had come to search him and his room since they received information that he was dealing in narcotic drugs. The accused was informed about his right to have search effected in the presence of a Gazetted Officer or a Magistrate of his choice if he so desired, but the said offer was declined by him. The accused was also informed that he has right to search all the members of the raiding party before search commenced and that offer was also declined. The accused was wearing a small leather purse with a string around his neck and upon opening the said purse a stick of charas individually wrapped in cellophane paper weighing 7 grams was found. The formality of putting the said contraband in envelopes and packing and sealing was done. Thereafter search of the Room No. 10-A was taken where suitcase was found having a false bottom. In the said false bottom of the

suitcase 1 kg. of charas was found, out of which a sample of 10 grams was taken and put in a separate envelope, packed and sealed and the remaining entire charas was packed in another envelope and sealed. Panchanama and seizure report were prepared. The complaint was filed, case was registered and the samples and substances recovered from the accused were sent for chemical analysis which were found to be containing charas. After the accused was charged for the offence punishable under section 20(b)(ii) of the N.D.P.S. Act, in support of its case, the prosecution examined Mahesh Kaissare (P.W. 1), Manohar Joshi (P.W. 2), Kariyapa Murgod (P.W. 3), Fiona Fernandes (P.W. 4), Cyril Mascarenhas (P.W. 5) and Shirish Thorat (P.W. 6). The prosecution also proved various documents including report of Chemical Analyser (P.W. 1/C), search panchanama (P.W. 3/A), seizure report (P.W. 3/B) and hotel register (P.W. 4/A).

4. Mr. Chari, the learned senior Counsel appearing for the accused/appellant made a multipronged attack on the soundness of the judgment passed by the Special Judge. He urged that the information received by P.W. 6 was about foreigner dealing in narcotic drugs and, therefore, P.S.I. knew that in raid, the panchas knowing English would be required, still no efforts were made to secure the presence of panchas knowing English nor any efforts were made to have the panchas from that very locality knowing English. According to the learned Senior Counsel, P.W. 3, one of the panch witnesses did not know English and though he claims to be witness to the transaction of raid and the conversation between the accused and P.W. 6, he could not be witness whether in fact any offer was made by P.W. 6 to the accused that if he wanted search could be made before a Gazetted Officer or Magistrate. According to the learned Senior Counsel, the only source of knowledge of P.W. 3 about the offer being made to the accused that if he wanted he could be searched before a Magistrate or Gazetted Officer is the statement made to him by P.W. 6. Thus, it is contended by Mr. Chari, the learned Senior Counsel that there was no compliance of mandatory provisions of section 50 and prosecution evidence in that regard is not acceptable. The learned Senior Counsel also took us through the depositions of P.W. 3, P.W. 4, P.W. 5 and P.W. 6 and highlighted the contradictions, which according to him, were material and create serious doubt about the presence of panchas during the raid and the entire prosecution story of search and seizure. As a corollary thereto the learned Senior

Counsel urged that the deposition of P.W. 6 cannot be said to be reliable and was not sufficient to bring home the guilt of the accused. It is also contended by the learned Senior Counsel that the story of recovery of 1 kilo of charas from Room No. 10-A alleged to be in possession of the accused is planted. In this connection, learned Senior Counsel invited attention to the charge which does not refer to that from Room No. 10-A in possession of the accused recovery of 1 kg. of charas was made. He also invited our attention to the deposition of P.W. 4 Fiona Fernandes, receptionist at Villa Fatima Beach Resort and urged that the register of the hotel was not part of the charge sheet nor accused was informed of the said register at any time earlier before recording of the evidence of P.W. 4 and that the entry No. 146 in column No. 2 dated 6-12-95 was admittedly written by P.W. 4 after the accused was arrested. In the circumstances, the learned Senior Counsel urged that the prosecution has miserably failed to prove the case against the accused and that renders the conviction and sentence passed against him unsustainable.

5. Mr. Bharne, learned Public Prosecutor, appearing for the State, seriously opposes the submissions of the learned Senior Counsel appearing for the accused/ appellant. He urged that there is no reason to discard the deposition of P.W. 3. The circumstances available on record duly corroborate his presence and P.W. 3 is reliable on all counts. The learned Public Prosecutor urged that the mandatory requirement of offer being made to the accused person under section 50 of the N.D.P.S. Act has been duly proved by the prosecution and the depositions of P.W. 6 and P.W. 3 duly corroborated by the panchanama, and it leaves no manner of doubt that the accused/ appellant was informed of his right that if he wanted, search could be made before a Gazetted Officer or Magistrate. The learned Public Prosecutor also referred to the contradictions highlighted by the learned Senior Counsel for the accused and urgedthat the contradictions so pointed were minor and not on material aspects and, therefore, on the basis of the said contradictions the deposition of P.W. 3 cannot be discarded. The learned Public Prosecutor also urged that recovery of 1 kg. of charas from the false bottom of the suitcase in Room No. 10-A which was in occupation of the accused is not an invented story as is sought to be projected by the learned senior Counsel. The learned Public Prosecutor urged that in the complaint, in the very first version it is stated that 1 kilo of charas was found from Room No. 10-A which was in

possession of the accused/ appellant. In this connection, the learned Public Prosecutor also referred to panchanama. depositions of P.W. 4 and P.W. 5. Thus, the learned Public Prosecutor contended that the judgment and sentence passed by the Special Judge does not suffer from any infirmity warranting interference from this Court.

6. It is the prosecution case that on 13-12-1995 at 17.25 hours an information was received by P.W. 6 that one foreigner residing in Room No. 10-A at Villa Fatima Beach Resort, Baga, Calangute, was dealing with narcotic drugs. Despite this information having been received and on the basis of that information, P.W. 6 decided to conduct the raid, he did not make any efforts of whatever nature to have the witnesses for search and seizure operation who were knowing English. Ordinarily, this circumstance, by itself, would not be of much significance and importance, but it does acquire significance when looked from the angle that a valuable right is conferred by law under section 50 of the N.D.P.S. Act upon the person who is sought to be searched for dealing in contraband that he should be informed by the search officer that if he desired, search could be effected either before a Gazetted Officer or Magistrate. Obviously, for a person to be witness to the transaction of such search and conversation, between the two persons in a particular language, such witness unless he has the knowledge of that language, he could not be said to be witness to the said transaction or conversation. A search officer being P.S.I. with reasonable prudence ought to have known that since raid was to be effected on a foreigner, the panch witnesses should be such who at least knew English. There is no dispute whatsoever that the conversation between P.W. 6 and the accused about his right to be searched before a Gazetted Officer or Magistrate was in English. It is the case of the prosecution itself that since P.W. 3 did not know English, P.W. 6 translated the conversation in Konkani to P.W. 3 and on that basis P.W. 3 deposed before the Court that P.W. 6 made an offer to the accused that if he wanted the search could be made before a Magistrate or Gazetted Officer. The source of what transpired in. the conversion between the accused and P.W. 6 to P.W. 3 is none other than P.W. 6. In the circumstances, the evidence of P.W. 3, to prove the fact, that the accused was offered by P.W. 6 that if he wanted, the search could be effected before a Magistrate or Gazetted Officer, is of not much value rather the deposition of P.W.

3 cannot be of any help to the prosecution to prove the fact that P.W. 6 did give offer to the accused that if he so desired, search could be effected either before a Magistrate or Gazetted Officer. Right given to the person under section 50 to be informed that if he desired, search could be effected before a Magistrate or Gazetted Officer is a valuable right and therefore to prove this fact that such offer was in fact given to the accused, there has to be cogent evidence upon which the Court could have implicit faith. Certain admission on the part of P.W. 3 in his cross-examination demolish the entire worth of his evidence on this aspect when he said he did not know English at all nor did he read the panchanama because he did not know English. He admitted that P.S.I. Thorat and accused were speaking in English language and P.S.I. Thorat was translating to him in Konkani. He also admitted that it was not stated in the panchanama that each question was translated to the panchas immediately. He also admitted that he could not read the signboard over that hotel and P.S.I. Thorat told him that the signboard read 'Villa Fatima Beach Resort'. On the face of such deposition of P.W. 3 how could the Court safely rely that the accused was given offer under section 50 that if he wanted or desired the search to be effected before a Magistrate or Gazetted Officer. The prosecution also admittedly did not produce the other pancha Shri Deepak Dessai who, according to P.W. 6 knew little English. The infirmities which the deposition of P.W. 3 suffers, search panchanama, though not substantive piece of evidence, also suffers from the same infirmities and the statement recorded therein that P.S.I. Thorat informed the accused that he had a right to be searched in the presence of a Gazetted Officer or Magistrate of his choice if he desired, could not be used as a reliable piece of corroborative evidence to the deposition of P.W. 6. It cannot be overlooked also that according to P.W. 3, P.W. 6 came in the jeep in which he was sitting from Panaji to Calangute. P.W. 3 deposed that P.W. 6 was sitting in the back side of the jeep along with them while P.I. Jadhav was sitting in the front side of the jeep. On the other hand, P.W. 6 deposed in unequivocable terms that he went on the motor cycle for the raid and one of the staff members was along with him on the motor cycle while the panchas were in the jeep. He arrived first at Villa Fatima Beach Resort and thereafter the jeep arrived. In the circumstances, it becomes highly doubtful whether P.W. 3 was at all present when the search of the accused was taken. This contradiction cannot be

attributed simply because of failure of memory by passage of time. P.W. 3 deposed that the translations were made to him after each question was put to the accused. However, in the panchanama there is no such statement that the translations were made after each question was put to the accused. Rather it is recorded in the panchanama that it was read over and explained to the panchas in Konkani and found correct by them as per their say and observations. In these circumstances, we find deposition of P.W. 3 is not acceptable that there is no reliable evidence independently corroborating the deposition of P.W. 6 that the accused was informed of his right that if he desired, search could be effected before a Magistrate or Gazetted Officer. We are far from saying that in no circumstance the sole testimony of the search officer can be acted upon by the Court for proof of search and seizure operation in the absence of corroboration by independent evidence. Nor are we for a moment suggesting that in all cases of raid under N.D.P.S. Act, the evidence of Police Officer must get corroboration from public witness. There is no principle of law that in each and every case the evidence of the search officer needs to be corroborated by a public witness nor is there any presumption that Police Officers are liars and their evidence is not acceptable on its own if capable of inspiring confidence. What value should be attached to the deposition of search officer, uncorroborated by independent evidence in the search and seizure operation under N.D.P.S. Act and where breach of mandatory provision of section 50 is alleged, would depend on facts and circumstances of each case. Unimpeachable quality of testimony of search officer even if uncorroborated inspiring full confidence may be acceptable. However, in the case where the breach of the provisions of law results in stringent penalty and punishment and the conviction could only be based upon testimony ofPolice Officer, the Court has to be very cautious in scrutinising the evidence of police officer bereft of corroboration and scan such evidence to rule out possibility whether conduct of such police officer in carrying out search and seizure operation was suspect. Testing the deposition of P.W. 6 Thorat from this touchstone, we do not find deposition of P.W. 6 inspiring full confidence. P.W. 6 decided to conduct the raid after he received the information that one foreigner staying in Room No. 10-A of Villa Fatima Beach Resort was dealing in narcotic drugs. Still, knowing that fact, he took alongwith him pancha P.W. 3 who was not knowing English at all.

There is no evidence on record that P.W. 6 could net secure the presence of panchas knowing English or that panchas knowing English were not available. Deepak Dessai, one of the panchas who was knowing little English has not been produced. Here is not a case where panchas were secured from the place where raid was conducted. Admittedly P.W. 6 took panchas from Panaji and he could have secured the presence of panchas knowing English if he so desired. These circumstances render the testimony of P.W. 6 suspect and his evidence cannot be said to be inspiring full confidence that he offered to the accused/appellant that if he desired, he may be searched before a Gazetted Officer or Magistrate and that the said offer was politely declined. In these circumstances, we hold that there was breach of section 50 of the N.D.P.S. Act and the accused has to be given benefit.

7. Adverting further to the deposition of P.W. 6, we find that before search was commenced, P.W. 6 had seen the register of the hotel. After the search of Room No. 10-A, P.W. 6 neither seized the hotel register nor got copy thereof. The statement of receptionist P.W. 4 Fiona who was present admittedly on 13-12-95 was not recorded on that day. The fact is that the statement of P.W. 4 Fiona was recorded after one week of the incident i.e. on 20th December, 1995. He could not explain the reason for not recording the statement of P.W. 4 either on the date of the search i.e. on 13-12-95 or immediately thereafter. The deposition of P.W. 4 in his cross-examination clearly shows that in Column No. 2, the date 6-12-1995 at Serial No. 146 was written only after the accused was arrested. P.W. 4 has been confronted with his police statement wherein it was recorded that the accused was residing in Room No. 9-A. P.W. 4 gave the explanation that it was only because of mistake. P.W. 4 stated that the accused shifted to Room No. 10-A on 6-12-95. If that was so, then why this fact was recorded in the register only after the accused was arrested? These circumstances do create serious doubt about the reliability of the prosecution evidence that Room No. 10-A was in fact in possession of the accused/appellant at the time of search. We, therefore, do not find that deposition of P.W. 6 can be relied upon safely. Non-seizure of the hotel register by P.W. 6 immediately after the search was conducted was very serious omission creating doubt about any recovery being made from the room in occupation of the accused/appellant. Surprisingly the register saw the light of the day only at the time of examination of P.W. 4 and not any time before that. This circumstance

again creates serious doubt about the prosecution story and the recovery of the contraband from the room in possession of the accused/appellant.

8. All in all, the evidence on record does not satisfy the compliance of section 50 of the N.D.P.S. Act and creates a serious doubt and suspicion about the recovery of the contraband from the person of the accused as well as from the room in possession of the accused/appellant. The trial Court, therefore, in our view, was not justified in convicting the accused/appellant for the offence punishable under section 20(b)(ii) of the N.D.P.S. Act.

9. We, accordingly, allow this appeal, set aside the judgment and order of conviction and sentence dated 19th February, 1997 passed by the Special Judge, N.D.P.S. Court and acquit the accused/appellant of the offence under section 20(b)(ii) of the N.D.P.S. Act. The accused is ordered to be released if not required in any other case.

10. Appeal allowed.