

J. Prakash Vs. State

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Court : Andhra Pradesh

Decided On : Aug-18-1997

Reported in : 1998(1)ALD602; 1998(1)ALT(Cri)116; 1998CriLJ3108

Judge : A. Hanumanthu, J.

Acts : [Narcotic Drugs and Psychotropic Substances Act, 1988](#) - Sections 8, 18, 20, 20(1), 41, 42, 43, 50 and 50 (1 and 2); [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 313

Appeal No. : CrI. A. No. 698 of 1993

Appellant : J. Prakash

Respondent : State

Advocate for Def. : Public prosecutor

Advocate for Pet/Ap. : Mr. A.T.M. Rangaramanujam, Adv.

Judgement :

1. This appeal is directed against the Judgement dated 24.06.1993 in Excise Case No. 7 of 1993 on the file of I Additional Sessions Judge, Chittoor whereunder the appellant was convicted for the offence under Section 18(c) read with Section 20(b) of [Narcotic Drugs and Psychotropic Substances Act, 1988](#) (hereinafter called as 'the Act') and sentenced to undergo rigorous imprisonment for three years and

also to pay a fine of Rs.3,000/- and in default to pay fine to suffer simple imprisonment for three months.

2. The case of the prosecution as revealed from the evidence on record is as follows:

i) P.W.4 who worked previously as Excise Sub-Inspector, Chittoor, went on raids to Rasanapalli village on 8.12.1992 along with P.W.3 the Excise Head Constable and the panch witnesses P.Ws. 1 and 2. At about 5.00 p.m. While there were at a distance of two furlongs southwest of Harijanawada near the Railway track, they noticed the appellant-accused coming towards Rasanapalli with a plastic bag, M.O.1, in his hand. On seeing the excise staff, the appellant tried to run away. Hence, on suspicion, the appellant was detained and the contents of the plastic bag, M.O.1, were checked by P.W.4 in the presence of mediators P.Ws. 1 and 2 and the excise staff. M.O.1 contained about three K.Gs. loose Ganja. On interrogation, the appellant gave his name and address but he did not disclose the source of Ganja. The appellant also did not produce any licence or permit for being in possession of the said Ganja P.W.4 then had taken sample from the Ganja contained in M.O.1, labeled and sealed the bag, M.O.1 and the sample packet. He arrested the accused and seized the contraband under pancha-nama Ex.P.3 attested by P.Ws.1, 2 and others. The accused was also served with a copy of the Panchanama and the acknowledgement, Ex.P.4. After returning to the Excise Station, P.W.4 registered Ex.P.3 as Crime No. 20 of 1992-93 under Section 8(c) read with Section 20(b)(i) of the Act and issued F.I.R Ex.P.5. He sent the accused for remand on the next day along with the case property. He sent the sample to the chemical examiner for the purpose of analysis and under Ex.P.6 the analyst found that the sample is Ganja. Further investigation was done by the Inspector, who laid the charge-sheet.

ii) The plea of the accused was one of denial. The prosecution examined P.Ws.1 to 4 and marked Ex.P. 1 to P.6 and M,Os.I. The accused, when examined under Section 313 Cr.P.C. with reference to the incriminating circumstances appearing against him in the evidence of P.Ws. 1 to 4, reiterated that he was innocent and that he had been implicated falsely as he had sent petitions against the Excise

officials. The accused did not choose to examine any witnesses on his behalf. On a consideration of the oral and documentary evidence on record, the learned Additional Sessions Judge found the accused guilty of the offence under Section 8 read with Section 20(b)(I) of the Act and convicted him for the said offences and sentenced him to suffer Rigorous Imprisonment for three years and also to pay a fine of Rs.3,000/- and in default to pay the fine to suffer further simple imprisonment for three months. Aggrieved of that verdict, the accused has come up with this appeal.

3. Heard the learned counsel for the appellant-accused and the learned Public Prosecutor, at length. The learned counsel for the appellant-accused look me through the entire evidence on record and also the impugned Judgement.

4. The learned counsel for the appellant raised the following contentions:

i) The mandatory provisions under Section 50 of the Act are not complied with before effecting the search on the person of the accused and as such the entire proceedings are vitiated and the accused is entitled for acquittal.

ii) The prosecution failed to produce the authorisation given to P.W.4 for effecting the search under the Act and as such P.W.4 was not competent to search and seize the contraband under the Act.

iii) The alleged seizure of contraband from the possession of the appellant-accused was false and the panch witnesses P.Ws.1 and 2 failed to support the prosecution case and the testimony of P.Ws.3 and 4 who are the Excise Police Officers should not be relied upon.

The learned Public Prosecutor submitted his arguments in support of the impugned Judgement.

5. Before considering the contentions raised on behalf of the appellant-accused, I may indicate that as per Ex.P.6 the chemical analyst report that the sample which was sent for chemical examination was found to be Ganja as defined under the relevant provisions of the Act.

6. As regards the first contention, it is contended by the learned counsel for the appellant-accused that the provisions under Section 50 of the Act are mandatory and in the instant case they are not complied with before effecting search on the person of the accused and as such the entire proceedings are vitiated and the appellant-accused is entitled for acquittal. There is much force in this contention. Sub-sections 1 and 2 of Section 50 read as under:

'50 Conditions under which search of persons shall be conducted :--(1) When any officer duly authorised under Section 42 is about to search any person under provisions of Section 41, Section 42, or Section 43, he shall if such person so requires, take such person without unnecessary delay to the nearest Gazetted Officer of any of the Departments mentioned in Section 42 or to the nearest Magistrate.

(2) If such requisition is made, the officer may detain the person until he can bring him before the Gazetted Officer or the Magistrate referred in sub-section (1).'

Under this section, it is obligatory- on the part of the empowered person to inform the person to be searched before search is being effected that he would like to be taken to the Gazetted Officer or nearest Magistrate. It has been held by the Supreme Court as well as this Court in catena of cases that provisions of Section 50 of the Act are mandatory and non-compliance thereof vitiates the conviction, vide Balbir Singh 's case : 1994 CriLJ3702 , Ali Mustafa Abdul Rahman Moose v. State of Kerala, : AIR 1995 SC244 , Mohinder Kumar v. State, Panaji, Goa, : 1995 CriLJ2074 , T.P.Razak alias Nagappan Razak v. State of Kerala, 1995 Suppl.(4) SCC 256 and Syed Mohd v. Syed Omar Syed, 1995 CLJ2662.

7. In the instant case, P.W.4 along with his staff, P.Ws. 1 and 2 proceeded to Rasanapalii on 18.12.1992 and at a distance of two furlongs to Harijanawada, the accused was found with a plastic bag coming towards Rasanapalii The evidence of P.W.4 on this aspect reads as follows:

``He (accused) tried to run away on seeing us. On suspicion we detained him, M.O.1 bag was searched in the presence of P.Ws. 1 and 2. It contained three K.Gs. of loose ganja. I interrogated the accused and questioned about the seizure

of the property. I took sample from M.O.1 bag and asked the accused whether he wished to be taken to the Gazetted Officer, he declined.'

Ex.P.3 is the Panchanama said to have been drafted at the time of search of the plastic bag and seizure of Ganja found in it. The relevant recitals in Ex.P.3 read as follows:

'The S.I. and staff surrounded and stopped him on suspicion and when examined the plastic bag in his right hand, it is tied with a thread. When opened it contained about three K.Gs. of loose Ganja. When S.I. enquired the said person about his name, village and about Ganja, in the presence of panchas he said that he is Jaya Prakash son of Jai Raj, age 32 years caste Christian resident of Rasanapalii. He did not give any particulars about Ganja. Then S.I. asked him whether he should be taken to a Gazetted Officer, to explain this crime and he said not necessary.'

8. On perusal this evidence on record, it cannot be that the mandatory provisions under Section 50 of the Act have been complied with by PW4 before effecting the search of plastic bag M.O.1 which was being carried on by the appellant-accused in his hand. P.W.4 did not categorically state in his evidence that before effecting the search he informed the accused whether he would like to be taken to a Gazetted Officer of any of the Departments mentioned in Section 42 of the Act or to the nearest Magistrate. The recitals in Ex.P.3 also are not to the effect that the accused was informed before a search of his plastic bag was effected whether he requires to be taken to the Gazetted Officer or to the Magistrate. On the other hand, the evidence of PW4 and the recitals in Ex.P.3 go to show as if PW4 questioned the accused after effecting search whether he should be taken to a Gazetted Officer to explain the crime. This seemed to have happened subsequent to the alleged search of the plastic bag M.O.1 which the accused was carrying in his hand. The learned Sessions Judge observed in para 15 of his Judgement thus:

'PW4 has informed the accused about his right to be taken before the Magistrate or Gazetted Officer for search but he declined. Similar recital is found in Ex.P.3.'

Obviously, this is a mis-reading of the evidence on record. There are no such recitals either in the evidence of P.W.4 or in the Panchanama Ex.P.3 quoted

above. If really P.W.4 had informed the accused that he would be taken to the nearest Magistrate or Gazetted Officer if the accused had so desired, he would not have failed to mention the same both in his evidence as well as in the panchanama, Ex.P.3, which was said to have been prepared at that time.

9. On a consideration of the evidence on record I am satisfied that P.W.4 did not ask the appellant-accused before search was conducted as to whether he would like to be produced before the Gazetted Officer or Magistrate. Hence, I am of the view that the prosecution has failed to establish that there was compliance of the mandatory provisions under Section 50 of the Act before conducting search of the appellant-accused.

10. There is also another aspect in this connection, A close scrutiny of the statement of P.W.4 and the averments in Ex.P,3, quoted earlier, leads towards the irresistible conclusion that P.W.4 himself has admitted that he did not inform the accused that he had an option to be searched before a Magistrate also. There is no reference to the Magistrate at all both in his evidence as well as Ex.P.3. He did not inform the accused to the effect that he has an option to exercise his right to be searched by a Magistrate also. There is a reference only to the Gazetted Officer but not to a Magistrate. Therefore, it is crystalclear that even if it is presumed that P.W.4 had given an option to the accused, it was only an option to be searched in the presence of Gazetted Officer and an option to be searched in the presence of Magistrate was not given to the accused-appellant before search was effected.

11. The learned Public Prosecutor submitted that under Section 50 of the Act, the option given by P.W.4 to the accused-appellant to be searched by a Gazetted Officer should be deemed to be sufficient compliance of Section 50 of the Act and it was not at all necessary to give option to the appellant-accused to be searched by a Magistrate also. In other words, according to the learned Public Prosecutor, option given for being searched before any one i.e. Gazetted Officer or Magistrate, is sufficient compliance of Section 50 of the Act. The learned Public Prosecutor further contends that the omission on the part of PW4 to inform the accused that he had an option as of right to be searched by a Magistrate also was only an

irregularity and on that ground the prosecution case cannot be brushed aside. The said argument of the learned Public Prosecutor is not acceptable to me inasmuch as it is well settled that whenever in an enactment two expressions are used, it must be held that both the expressions are used purposely by the legislature. If the afore-said argument of the learned Public Prosecutor is accepted, then the expression 'Magistrate' used under Section 50 of the Act, will become redundant which is not permissible under any school or rule of interpretation having penal consequences. With regard to the possession of the contraband article under the Act, the accused is entitled to be searched in the presence of a Gazetted Officer or a Magistrate. The provisions in this regard under Section 50 of the Act are mandatory and the language thereof obliges an Officer concerned to inform the person to be searched to the effect that he is entitled as of right about the search to be conducted in the presence of a Gazetted Officer or a Magistrate. In the present case, from the evidence of P.W.4 as well as from Ex.P.3 it is evident that there is flagrant violation of Section 50 of the Act. In view of the non-compliance of the mandatory provisions under Section 50 of the Act, no reliance can be placed on the alleged search of the appellant-accused and alleged recovery of contraband from his possession. It is held in *All Mustafa Abdul Rehman Moose's* case, stated supra, that the contraband seized as a result of illegal search or seizure cannot be used to fasten an unlawful possession of the contraband on the person from whom the contraband had allegedly been seized in an illegal manner.

12. The learned Public Prosecutor also contended that even if the provisions under Section 50 of the Act, are mandatory, it is applicable only when 'the person' of the accused is searched but not when the bag which is in the possession of the accused is searched. As seen from the impugned Judgement, such a contention was also raised before the learned Sessions Judge and the same was accepted by him. But in my opinion, the expression 'search of a person' as found in Section 50 of the Act would include the search of articles in immediate possession such as bag and other luggage carried by him or in physical possession of the person to be searched. I am fortified in my opinion by the decision of Bombay High Court and also of the Apex Court.

13. In 'Ebanezer Adebaya alias Monday Obtor v. B.S. Rawat, Collector of Customs and others, 1996 CCR 478= 1996 CLJ 3210, the Full Bench of the Bombay High Court in criminal Appeal No.531 of 1993 has considered as to what meaning can be assigned to the phrase 'to search any person' used in the Act. The Full Bench, in para 5 of the Judgement, has considered 'Whether to search any person' means :

(a) search of articles on the person or body of the person; or

(b) would include search of articles in immediate possession such as bag and other luggage carried by him or in physical possession of the person to be searched; or

(c) would include search of bag or luggage which are presumed to be in possession of the person even though it may be lying in a house, or railway compartment or at the airport; and

(d) Whether application of Section 50 can be extended to a case of search of a place, a conveyance or a house if the accused is physically present at the time of the search'.

After considering the relevant cases and provisions of the Act, it was held that the phrase 'to search any person' contained in Section 50 of the Act would be confined to clauses (a) and (b) and it does not include and cannot be extended to clauses (c) and (d).

In 'Namdi Francis Nwazor v. Union of India and another,' 1997 CCR 27 SC, the Apex Court held that if a person is carrying a hand bag or like and the incriminating article is found therefrom, it would still be a search of the person of the accused requiring compliance with Section 50 of the Act. In Para 3 of the Judgement, their Lordships observed thus:

'On a plain reading of sub-section (1) of Section 50, it is obvious that it applies to cases of search of any person and no search of any article in the sense that the article is at a distant place from where the offender is actually searched. This position becomes clear when we refer to subsection (4) of Section 50 which in

terms says that no female shall be searched by any one excepting a female. This would, in effect, mean that when the person of the accused is being searched the law requires that if that person happens to be a female, the search shall be carried out only by a female. Such a restriction would not be necessary for searching the goods of female which are lying at a distant place at the time of search. It is another matter that the said article is brought from the place where it is lying to the place where the search takes place but that cannot alter the position of law that the said article was not being carried by the accused on his or her person when apprehended. We must hasten to clarify that if that person is carrying hand bag or like and the incriminating article is found therefrom, it would still be a search of the person of the accused requiring compliance with Section 50 of the Act. However, when an article is lying elsewhere and is not on the person of the accused and is brought to a place where the accused is found, and on search, incriminating articles are found therefrom, it cannot attract the requirements of Section 50 of the Act for the simple reason that it was not found on the accused person. So, on the facts of this case, it is difficult to hold that Section 50 stood attracted and non-compliance with that provision was fatal to the prosecution case.'

14. The other contentions raised by the learned Counsel for the appellants need not be considered since I am with him on his submission that there is no compliance of the mandatory provision of Section 50 of the Act and since it goes to the root of the matter.

15. For the afore-said reasons, the appeal is allowed and the impugned Judgement convicting and sentencing the appellant-accused is set aside. The appellant-accused who has been granted bail as per order of this Court in Criminal Miscellaneous Petition No.1927 of 1993 dated 21.07.1993 need not surrender and the bail bond is hereby cancelled.