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Court : Andhra Pradesh

Decided On : Nov-16-2007

Reported in : 2008(1)ALD(Cri)213; 2008(1)ALT(Cri)113

Judge : G. Yethirajulu, J.

Acts : [Narcotic Drugs and Psychotropic Substances Act, 1985](#) - Sections 20, 41, 42, 42(1), 42(2), 43, 50, 52, 54 and 57; ;[Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 100

Appeal No. : Criminal Appeal No. 1117 of 2001

Appellant : Dasari Pullareddy and anr.

Respondent : State of A.P. Rep. by Public Prosecutor, High Court of A.P.

Advocate for Def. : Pubic Prosecutor

Advocate for Pet/Ap. : C. Praveen Kumar, Adv.

Disposition : Appeal dismissed

Judgement :

G. Yethirajulu, J.

1. This Appeal is preferred by the accused in S.C. No. 36 of 2000 on the file of the I Additional Sessions Judge, Kadapa.

2. A-1 was charged for the offences under Sections 20(b)(i) of the [Narcotic Drugs and Psychotropic Substances Act, 1985](#) (for short 'NDPS Act') for possessing ganja of 13 bags weighing 130 KGs on 04-01-2000. A-2 was also charged for 20 (a) (1) of the NDPS Act for cultivating ganja plants in the land measuring an extent of Ac.1-40 cents of Pochammareddipalli in Sy. No. 128/2.

3. It is alleged by the prosecution that on 04-01-2000 at about 6-30 AM, the Inspector, his men and the mediators went to Pochammareddipalli village and when they were waiting near 'Vanka' towards southern side of the village, at a distance of about 11/2 KM, a double bullock cart loaded with gunny bags was being driven by one person sitting on the cart and another person was following the cart. On seeing the police party, they attempted to run away. The police surrounded and caught hold of them. On ascertaining, they disclosed their identity as A.1 and A.2 and A-1 informed that he was eking out his livelihood by selling ganja by purchasing it from the village and selling them in towns. A-2 cultivated the ganja plants and agreed to sell the same at Rs. 600/- per bag and as A-2 told him that he was having 13 bags of Ganja leaves, A-1 took the bullock cart, loaded the cart with bags with an intention to weigh them at his house and to pay the amount to A-2. A-1 informed the police that after cleaning the ganja leaves, he sells the same at Rs. 1500/- per KG. On the said information, the police opened the bags and took the samples of ganja in separate plastic bags for chemical examination and affixed labels to the bags with the signatures of the panchayatdars, arrested the accused and sent them for remand. A report was prepared to that effect and the panchas signed on it, after seizure of the bags and arrest of the accused, the samples sent to the analyst discloses that the samples contain Narcotic Drugs and it is a Narcotic Drug defined under the Act. When the accused denied the charges, the prosecution examined PWs.1 to 5 and marked Exs.P-1 to P-5 to establish the offence against the accused. No oral or documentary evidence was adduced on defence side.

4. The learned Counsel for the Appellants submitted that no seizure was effected from either of them; that the seizure and arrest of the accused was not done in the presence of a Gazetted Officer and that the procedure contemplated under the NDPS Act is not followed, therefore, the Judgment of the lower Court is liable to be set aside by acquitting the accused.

5. The learned Public Prosecutor submitted that the police found the accused carrying ganja plants in gunny bags loaded on a double bullock cart; that they seized the gunny bags after the accused disclosing their identity and on confirmation that the material contained in the gunny bags is a ganja, therefore, the police took the samples in the presence of the mediators and the seizure of the material was effected in their presence and a panchanama was written incorporating the happenings at the time seizure and arrest of the accused. There is no illegality committed by the prosecution, therefore, the Appeal is liable to be dismissed.

6. In the light of the contentions raised by the parties, the point for consideration is:

Whether the prosecution proved the guilt of the accused beyond reasonable doubt?

7. PW-1, the Village Administrative Officer of the neighbouring village, was said to be one of the mediators for the panchanama prepared at the scene of offence. But, this witness did not support the prosecution version, therefore, he was declared hostile.

8. PW-2, the then M.R.O., Veerapanayunipalli, deposed that he was present when 13 bags of ganja was seized from the accused by the Excise Inspector at Pochamreddipalli. At the said time, the Inspector of Police, Erraguntla, the S.I. and two other constables are present. Each bag contained 10 KGS of ganja. The accused were taken into custody in their presence after seizure of the ganja. The samples were also taken by the police in their presence from all the bags and later affixed labels. In the cross-examination, he stated that the Inspector of Police came to him at 7-30 AM. They started from their office at 7-45 AM and reached the scene of offence within half an hour. Drafting of panchanama and taking of

samples was completed within 15 minutes. Ex.P-1 does not show that the samples were sealed. He denied a suggestion that he did not go along with the Inspector and did not participate as a panch for the seizure and arrest of the accused.

9. PW-3, the then Inspector of Police, Erraguntla, deposed that on 04-01- 2000, himself, the S.I. of Police, his staff members and mediators went towards southern side of Pochamreddypalli village and arrested A-1 and A-2, who were found transporting 13 bags of ganja in a D.B.Cart. He took samples under the cover of panchanama, which was attested by PWs.1 and 2. He further deposed that he went to the filed of A-2 and prepared an observation report covered by Ex.P-2. He endorsed the panchanama to the S.I. of police in charge of the Police Station to register the case and for further investigation. In the cross examination, he stated that on 04-01-2000, he received information that the accused were transporting ganja from Pochamreddipalli to Nagor. He did not reduce the said information into writing. He went to M.R.O. at 6-15 AM and he was present in the office. He picked up PW-1 at Veerapanayanapalli. He affixed seals on the labels of the samples, though it was not mentioned in Ex.P-1 panchanama that the seals were affixed on the labels attached to the samples. He further stated that the land of A-2 is on the southern side of the village. He denied a suggestion that A-2 does not have any land on the southern side. He denied a further suggestion that the ganja does not belong to the accused and he filed the false case at the instance of the enemies.

10. PW-4, the then Sub-Inspector of Police, Kamalapuram Police Station, deposed that he acted in-charge S.I. of Police for Pochamreddipalli during the relevant time. On 04-01-2000 during the early hours, he along with PWs.1 and 2 followed the Inspector of Police to Pachamreddipalli on the information that there was ganja. At 6-30 AM, they went to vanka which is half KM away from the road. They found a double bullock cart with 13 bags of ganja with two persons. They apprehended them and asked about their identity. The accused disclosed their identity and the 13 bags of ganja, each bag weighing 10 KGs, was seized under Ex.P-2 panchanama. They took samples from each bag and affixed labels and signatures. They also went to the scene where the ganja was cultivated. The land was situated at a distance of 1/2 KM on the southern side. They seized the branches and leaves under the cover of Ex.P-2 panchanama. He denied a suggestion that

they foisted the case against the accused.

11. PW-5 is the Sub-Inspector of Police, who deposed that the case property was sent to the Court along with the letter of advise to send the samples to the FSL, Kurnool. After completion of the investigation, the police laid the charge sheet.

12. After considering the above evidence, the lower Court came to a conclusion that the prosecution proved the guilt of the accused beyond reasonable doubt and accordingly, convicted both of them for the respective offences and sentenced to undergo rigorous imprisonment for one year and to pay a fine of Rs. 2000/- in default to suffer simple imprisonment for three months on each of the accused. Being aggrieved by the same, the accused preferred the present Appeal.

13. The lower Court observed that though PW-1 turned hostile, the evidence of PWs.2 to 4 amply established the offence against the accused. No explanation was given by A-1 for the possession of ganja and A-2 stated that he has no land at all and he was involved in this false case.

14. The learned Counsel for the Appellants further submitted that the evidence of PWs.2 to 4 is inconsistent regarding the time of search and seizure and the Investigating Officer failed to follow the mandatory provisions of Sections 52 and 54 of the NDPS Act, therefore, the Judgment of the lower Court is liable to be set aside.

15. The learned Counsel also relied on the following Judgments in support of his contention that the prosecution against the Appellants is not maintainable.

i) In *Pentapati Venkata Satyanarayana Murthy v. State of A.P.* 1999 CRI.L.J. 4190, a learned single Judge of this Court, while considering the scope of Section 20(1)(a) of the NDPS Act, held that on account of failure by the empowered officer to comply the provisions of Section 42(1) and (2), the Accused is entitled for acquittal by observing that Section 42(1) of the NDPS Act contemplates, as held by the Supreme Court in *Panjab v. Balbir Singh* AIR 1994 SC 1872, that where the officer empowered under Section 42(1) of the NDPS Act proceeds to search any premises on the basis of information given by any person, such information should

necessarily be taken down in writing.

ii) In BALBIR SINGH's Case (AIR 1994 SC 1872 supra), the Supreme Court observed that:

Under Section 42(1) the empowered officer if has a prior information given by any person, that should necessarily be taken down in writing. But if he has reason to believe from personal knowledge that offences under Chapter IV have been committed or materials which may furnish evidence of commission of such offences are concealed in any building etc., he may carry out the arrest or search without a warrant between Sunrise and sunset and this provisions does not mandate that he should record his reasons of belief.

In the present case, there is vague information to the Investigating Officer that some ganja was being transported. He did not mention that so and so person came and informed him about the commission of the offence, therefore, the principle laid down by the Supreme Court in the above case is not applicable to the facts of the present case.

iii) In Abdul Rashid Ibrahim Mansuri v. State of Gujarat : 2000 CriLJ1384 , the Supreme Court held that:

If the officer has reason to believe from personal knowledge or prior information received from any person that any narcotic drug or psychotropic substance (in respect of which an offence has been committed) is kept or concealed in any building, conveyance or enclosed place, it is imperative that the officer should take it down in writing.

iv) In Shahid Khan and Ors. v. Director of Revenue Intelligence, Govt. of India, Hyderabad 2001 CRI.L.J. 3183 , a learned single Judge of this Court held that: the fact that the information was collected through intelligence department does not absolve the officer from non-compliance of mandatory provisions of Section 42(2) of the NDPS Act and the accused is entitled to be acquitted for failure of the officer giving information to the superior officer.

v) In *Koluttumottil Razak v. State of Kerala* : (2000)4SCC465 , the Supreme Court held that:

Non-compliance with the requirements of Section 42 (1) and (2) would render the resultant of search and seizure suspect, though that by itself may not vitiate the proceedings.

The Supreme Court further observed that:

In the light of the non-compliance with the provisions of Section 42(1) and (2) of the Act besides non-compliance with the requirement in Section 50 of the Act it is difficult to sustain the conviction and sentence of the appellant. The graver the consequences the greater must be the circumspection to be adopted.

vi) In *Matta Prasad v. State, Prohibition and Excise Circle 2005 (1) ALT (CrI.) 472 (A.P.)*, a learned single Judge of this Court held that in the light of the facts, the prosecution cannot take aid of Section 43 of the Act so as to wriggle out of the rigor imposed by Section 42 of the Act and hence in view of the fact that the mandatory provisions of Section 42 of the Act had not been complied with, the search and seizure are vitiated and accordingly the conviction and sentence are hereby set aside.

vii) In *Ankireddy Ramana Reddy v. State of A.P. 2005 (3) ALT (CrI.) 176 (A.P.)*, this Court held that in case of seizure of ganja from a plastic gunny bag, the authorized person need not comply Section 50 of the Act, as it is not the search of person of the accused. In case of search of person only, the presence of the Gazetted officer is required to be secured.

viii) In *Mankena Rangaiah v. State of A.P. 2006 (1) ALT (CrI.) 32 (A.P.)*, a learned single Judge of this High Court held that:

When the prosecution was unable to produce positive evidence relating to the compliance of the mandatory provisions, there is no duty cast upon the accused as such, to put such questions seeking further clarification filling up such lacunae in the version of the prosecution.

16. There is no dispute about the principles laid down in the above decisions. But, it has to be verified whether those decisions are applicable to the facts and circumstances of this case.

17. For proper adjudication, it is appropriate to extract the Sections 42, 43, 50 and 54 of NDPS Act, which read as hereunder:

42. Power of entry, search, seizure and arrest without warrant or authorization (1) Any such officer (being an officer superior in rank to a peon, sepoy or constable) to the departments of central excise, narcotics, customs, revenue intelligence or any other department of the Central government including para- military forces or armed forces as is empowered in this behalf by general or special order by the Central Government, or any such officer (being an officer superior in rank to a peon, sepoy or constable) of the revenue, drugs control, excise, police or any other department of a State Government as is empowered in this behalf by general or special order of the State Government, if he has reason to believe from personal knowledge or information given by any person and taken down in writing that any Narcotic Drug, or Psychotropic Substance, or controlled substance in respect of which an offence punishable under this Act has been committed or any document or other article which may furnish evidence of the commission of such offence or any illegally acquired property or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act is kept or concealed in any building, conveyance or enclosed place, may between sunrise and sunset--

(a) enter into and search any such building, conveyance or place;

(b) in case of resistance, break open any door and remove any obstacle to such entry;

(c) seize such drug or substance and all materials used in the manufacture thereof and any other article and any animal or conveyance which he has reason to believe to be liable to confiscation under this Act and any document or other article which he has reason to believe may furnish evidence of the commission of any offence punishable under this Act or furnish evidence of holding any illegally

acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act; and

(d) detain and search, and, if he thinks proper, arrest any person whom he has reason to believe to have committed any offence punishable under this Act:

PROVIDED that if such officer has reason to believe that a search warrant or authorization cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter an search such building, conveyance or enclosed place at any time between sunset and sunrise after recording the grounds of his belief.

43. Power of seizure and arrest in public place: Any officer of any of the departments mentioned in Section 42 may-

(a) seize in any public place or in transit, any Narcotic Drug or Psychotropic Substance or controlled substance in respect of which he has reason to believe an offence punishable under this Act has been committed, and, along with such drug or substance, any animal or conveyance or article liable to confiscation under this Act, any document or other article which he has reason to believe may furnish evidence of the commission of an offence punishable under this Act or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act;

(b) detain and search any person whom he has reason to believe to have committed an offence punishable under this Act, and if such person has any Narcotic Drug or Psychotropic Substance or controlled substance in his possession and such possession appears to him to be unlawful, arrest him and any other person in his company.

50. Conditions under which search of persons shall be conducted:

(1) When any officer duly authorized under Section 42 is about to search any person under the provisional 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 to in Sub-section (1).

(3) The Gazetted Officer or the Magistrate before whom any such person is brought shall, if he sees no reasonable ground for search, forthwith discharge the person but otherwise shall direct that search be made.

(4) No female shall be searched by anyone excepting a female.

(5) When an officer duly authorized under Section 42 has reason to believe that it is not possible to take the person to be searched to the nearest Gazetted Officer or Magistrate without the possibility of the person to be searched parting with possession of any Narcotic Drug or Psychotropic Substance, or controlled substance or article or document, he may, instead of taking such person to the nearest Gazetted Officer or Magistrate, proceed to search the person as provided under Section 100 of the Code of Criminal Procedure, 1973.

(6) After a search is conducted under Sub-section (5), the officer shall record the reasons for such belief which necessitated such search and within seventy- two hours send a copy thereof to his immediate official superior.

54. Presumption from possession of illicit articles.-

In trials under this Act, it may be presumed, unless and until the contrary is proved, that the accused has committed an offence under this Act in respect of-

(a) any narcotic drug or psychotropic substance or controlled substance;

(b) any opium poppy, cannabis plant or coca plant growing on any land which he has cultivated;

(c) any apparatus specially designed or any group of utensils specially adopted for the manufacture of any narcotic drugs or psychotropic substance or controlled substance; or

(d) any materials which have undergone any process towards the manufacture of a narcotic drug or psychotropic substances or controlled substance, or any residue left of the materials from which any narcotic drug or psychotropic substance or controlled substance has been manufactured, for the possession of which he fails to account satisfactorily.

18. The learned Counsel for the appellants further submitted that the seizure and arrest of the accused was not done in accordance with the procedure, therefore, the judgment of the trial Court is not sustainable.

19. In *State of Rajasthan v. Babu Ram* : (2007)6SCC55 the Supreme Court of India while dealing with Section 50 of NDPS Act held that under Section 50, the accused has to be informed about his right of being searched before a Gezatted Officer or a Magistrate before conducting the search. The non-compliance of the provision would not vitiate the trial but would render recovery of the contraband suspect and conviction and sentence unsustainable.

20. In *Ravindran v. Superintendent of Customs* : 2007 CriLJ3414 when arrest and seizure was made at bus-stand and not in any building, conveyance or enclosed place, Section 42 of the Act was not attracted. The case was covered by Section 43, which does not require the information of any person to be taken down in writing or that officer concerned must send a copy thereof to his immediate official superior within 72 hours. It is further held that in case of search of bag carried by the accused, Section 50 is not attracted. Hence, the plea of the accused that he was not informed of his legal right to get his person searched in the presence of a gazetted officer or a Magistrate, but was merely given an option of being searched either before a gazetted officer or a Magistrate was not sustainable. It was further held that non-examination of independent witness to search proceedings is not fatal to the prosecution, but where such witness is not examined during the course of trial, the evidence of official witnesses may be approached with suspicion and corroboration may be insisted upon.

21. The learned Counsel for the appellants argued that Section 42(2) of the Act, which was mandatory, was not complied with and the independent witnesses were not examined at the trial, which was fatal to the case of the prosecution. He further

submitted that the trial was vitiated for non-compliance of the mandatory provisions of Sections 50 and 57 of the Act.

22. Section 42 is not at all attracted to the facts and circumstances of the case and it is covered by Section 43 of the Act, which does not require the information of any person to be taken down in writing or that the officer concerned must send a copy thereof to his immediate official superior within 72 hours. In the instant case, the bags were being carried on a cart, therefore, Section 50 is not attracted to the facts of this case.

23. The learned Counsel further submitted that two independent witnesses in whose presence the accused were searched, were not examined at the trial and non-examination of those witnesses during the trial is fatal to the case of the prosecution. In this case, the witnesses were examined, but they turned hostile and did not support the prosecution version. Therefore, the case cannot be thrown out automatically. When the official witnesses were examined, the evidence of official witnesses may be approached with suspicion and corroboration may be insisted upon of their evidence with other evidence. The evidence of police officers cannot be discarded merely on the ground that they belong to the police force and are either interested in the investigating or prosecuting agency, but as far as possible, corroboration of their evidence in material particulars should be sought.

24. In the case on hand, the trial Court found that there is corroboration from other circumstances to establish the case against the accused. The non- explanation of the accused for possession of ganja is also a circumstance lending support to the prosecution case.

25. After going through the material, I am of the considered view that the prosecution placed sufficient material to establish the guilt of both the accused beyond reasonable doubt. In the light of the above decisions, the evidence of the police officers cannot be thrown out in the present set of circumstances even though there are no independent witnesses supporting the prosecution version. Therefore, I do not find any illegality in the judgment rendered by the learned Sessions Judge and I do not find any ground to interfere with the same.

26. In the result, the Criminal Appeal is dismissed confirming the judgment of the trial Court in all respects.

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