

K. Venkatesham and anr. Vs. State of A.P.

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Court : Andhra Pradesh

Decided On : Apr-26-2000

Reported in : 2000(2)ALD(Cri)64; 2000CriLJ3156

Judge : G. Bikshapathy, J.

Acts : [Narcotic Drugs and Psychotropic Substances Act, 1985](#) - Sections 22, 41 to 44, 50, 52 and 57; ;Code of Criminal Procedure (CrPC) , 1974 - Sections 100, 165 and 235(2)

Appeal No. : Crl. Appeal No. 1213 of 1998

Appellant : K. Venkatesham and anr.

Respondent : State of A.P.

Advocate for Def. : Public Prosecutor

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

Disposition : Appeal allowed

Judgement :

ORDER

G. Bikshapathy, J.

1. The criminal appeal is filed against the judgment of the learned Metropolitan Sessions Judge, Hyderabad in Sessions Case No. 258 of 1997, dated 30-6-1998.
2. The appellants-A1 and A2 were prosecuted for an offence punishable under Section 22 of [Narcotic Drugs and Psychotropic Substances Act, 1985](#), hereinafter referred to as Act. The appellants herein are referred to as accused for convenience sake. It is the case of the prosecution that the accused, on 24-3-1997 at about 6.45 p.m., were transporting Diazepam in a huge quantity in an Ambassador car bearing No. AAY.5907. The Inspector of Police, Ramgopalpet P.S. received information to that effect and on the basis of the said information and with the assistance of Sub-Inspector of Police and other staff, he proceeded to CTO X-Roads and intercepted the white Ambassador car bearing No. AAY. 5907 at 7.15 p.m. and found that the appellants-A1 and A2 were sitting in front of the seat of the car. On interception, the Inspector of Police gave an option to the appellants whether they intend to be searched in the presence of a Gazetted Officer or the Magistrate. As there was no positive response, he secured the assistance of the Assistant Commissioner of Police and searched the car in the presence of two mediators. On such search, he found polythene covers containing Diazepam in all weighing 200 kgs. The Inspector of Police also recorded the confessional statements of the appellants separately in the presence of panch witnesses. The Diazepam was seized under a proper panchanama. Thereafter a chargesheet was laid before the Court.
3. The prosecution examined five witnesses and marked Exs. P1 to P5 and material objects Mos. 1 to 48. The accused neither examined any witnesses nor marked any documents on their behalf. The learned trial Court after considering the evidence on record, found that the offence has been established beyond reasonable doubt, and accordingly after following the procedure laid down under Section 235(2) of the Code of Criminal Procedure, both the accused were sentenced for rigorous imprisonment for a period of 10 years each and to pay a fine of Rs. One Lakh each, in default to suffer rigorous imprisonment for one year each. The case properties Mos. 20 to 38 were directed to be disposed of, MO. 39 shall be confiscated to the State and Mos. 1 to 19 shall be destroyed. Against the above judgment, the present appeal has been preferred by the accused.

4. The learned counsel for the appellants-Sri Padmanabha Reddy at the threshold submits that apart from the lacunae in the merits of the case, there is a flagrant violation of Section 42(1) of the Act. The Supreme Court while interpreting the said section has clearly held that the provisions of Section 42(1) of the Act are mandatory in nature and failure to comply with the said conditions would vitiate the trial. He relied on the decisions of the Supreme Court reported in *State of Punjab v. Balbir Singh* : 1994 CriLJ3702 ; *Mohinder Kumar v. State, Panaji, Goa* : 1995 CriLJ2074 ; *State of Punjab v. Baldev Singh* 1999 SCC (Cri) 1080 : 1999 Cri LJ 3672 and *Abdul Rashid Ibrahim Mansuri v. State of Gujarat*, 2000 (1) Andh LD (Cri) 404 (SC). On the other hand the learned Public Prosecutor submits that there was no violation of Section 42 as such. In fact it has been brought out in the evidence that the Investigating Officer has recorded the same in the General Diary and, therefore, it cannot be said that there is a violation of Section 42(1) of the Act. Under those circumstances, it is not open for the appellants to contend that the trial is vitiated on account of non-compliance of the provisions contained in Section 42(1) of the Act.

5. Before going into other aspects on the merits of the case, it is necessary to decide as to whether there is a violation of the provisions of Section 42(1) of the Act and if it is so, such violation is fatal to the prosecution.

6. It is necessary to extract Section 42(1) of the Act, which reads thus-

42. Power of entry, search, seizure and arrest without warrant or authorisation.- (1) Any such officer (being an officer superior in rank to a peon, sepoy or constable) of the documents of Central Excise, Narcotics, Customs, Revenue, Intelligence or any other Department of the Central Government or of the Border Security Force 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, in respect of which an offence

punishable under Chapter IV has been committed or any document or other article which may furnish evidence of the commission of such offence 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 obstacle to such entry;

(c) seize such drug or substance and all materials use 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 Chapter IV relating to such drug or substance; 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 Chapter IV relating to such drug or substance :

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

(Emphasis supplied)

Therefore, a reading of the said provision it is clear that it is open for the officer to conduct the search of a building, conveyance or enclosed place at any time between sunset and sunrise without warrant. The source of information emanates from two channels, viz., (a) personal knowledge leading to forming a reasonable belief and (b) information given by any person and taken down in writing. However under the proviso, if the search is done between sunset and sunrise, it is obligatory on the part of the officer to record the grounds of his belief. If it is a case of information from outsider it must be taken down in writing or if it is a case of belief basing on personal knowledge, he must also record the grounds for forming

such a belief. The learned counsel for the appellants submits that this requirement has not been complied with in the present case and, therefore, the entire prosecution has to fall on this ground alone. He takes this Court to the findings of the Investigating Officer P.W. 3. He stated that he received credible information on 24-3-1997 at about 6.45 p.m. that an Ambassador car bearing No. AAY 5907 was passing through CTO X-Roads between 7 and 8 p.m. containing Diazepam. Then he secured the presence of mediators P.Ws. 1 and 2 and visited the spot. He admitted that he did not record the information received by him in writing. Even in the cross-examination he only stated that he recorded the information in the General Diary and that General Diary entry was not produced before the Court for scrutiny so as to satisfy whether the Investigating Officer had complied with the statutory compliance. This issue came up for consideration before the Supreme Court in the judgment cited supra (1994 Cri LJ 3702). While dealing with Section 42, the Supreme Court observed as follows (para 26) :-

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 provision does not mandate that he should record his reasons of belief. But under the proviso to Section 42(1) if such officer has to carry out such search between sunset and sunrise, he must record the grounds of his belief. To this extent these provisions are mandatory and contravention of the same would affect the prosecution case and vitiate the trial.

Thus, it was made clear by the Supreme Court that violation of Section 42(1) would affect the prosecution and it vitiates the trial. While dealing with the object of NDPS Act, the Supreme Court observed as follows (para 16):-

The object of NDPS Act is to make stringent provisions for control and regulation of operations relating to those drugs and substances. At the same time, to avoid harm to the innocent persons and to avoid abuse of the provisions by the officers,

certain safeguards are provided which in the context have to be observed strictly. Therefore these provisions make it obligatory that such of those officers mentioned therein, on receiving an information, should reduce the same to writing and also record reasons for the belief while carrying out arrest or search as provided under the proviso to Section 42(1). To that extent they are mandatory. Consequently the failure to comply with these requirements affects the prosecution case and, therefore, vitiates the trial.

7. The said section came up for consideration once again before the Supreme Court in *Namid Francis Nwazor v. Union of India* 1999 SCC (Cri) 81 referred the matter to a larger Bench consisting of more than three-Judges and that was decided in the judgment cited supra (3). While reiterating the principle settled by the Supreme Court in *Balbir Singh's case* (1994 Cri LJ 3702), the Supreme Court recorded the following conclusions (para 26) :-

(1) If a police without any prior information as contemplated under the provisions of the NDPS Act makes a search or arrests a person in the normal course of investigation into an offence or suspected offences as provided under the provisions of Cr. P.C. and when such search is completed at that stage Section 50 of the NDPS Act would not be attracted and the question of complying with the requirements thereunder would not arise. If during such search or arrest there is a chance recovery of any narcotic drug or psychotropic substance then the police officer, who is not empowered, should inform the empowered officer, who should thereafter proceed in accordance with the provisions of the NDPS Act. If he happens to be an empowered officer also, then from that stage onwards, he should carry out the investigation in accordance with the provisions of the NDPS Act.

(2-A) Under Section 41(1) only an empowered Magistrate can issue warrant for the arrest or for the search in respect of offences punishable under Chapter IV of the Act etc. when he has reason to believe that such offences have been committed or such substances are kept or concealed in any building, conveyance or place. When such warrant for arrest or for search is issued by a Magistrate who is not empowered, then such search or arrest if carried out would be illegal.

Likewise only empowered officers or duly authorised officers as enumerated in Sections 41(2) and 42(1) can act under the provisions of the NDPS Act. If such arrest or search is made under the provisions of the NDPS Act by any one other than such officers, the same would be illegal.

(2-B) Under Section 41(2) only the empowered officer can give the authorisation to his subordinate officer to carry out the arrest of a person or search as mentioned therein. If there is a contravention, that would affect the prosecution case and vitiate the conviction.

(2-C) 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 provision does not mandate that he should record his reasons of belief. But under the proviso to Section 42(1) if such officer has to carry out such search between sunset and sunrise, he must record the grounds of his belief.

To this extent these provisions are mandatory and contravention of the same would affect the prosecution case and vitiate the trial.

(2) Under Section 42(2) such empowered officer who takes down any information in writing or records the grounds under proviso to Section 42(1) should forthwith send a copy thereof to his immediate official superior. If there is total non-compliance of this provision the same affects the prosecution case. To that extent it is mandatory. But if there is delay whether it was undue or whether the same has been explained or not, will be a question of fact in each case.

(4-A) If a police officer, even if he happens to be an 'empowered' officer while effecting an arrest or search during normal investigation into offences purely under the provisions of Cr. P.C. fails to strictly comply with the provisions of Sections 100 and 165, Cr.P.C. including the requirement to record reasons, such failure would only amount to an irregularity.

(4) If an empowered officer or an authorised officer under Section 42(2) of the Act carries out a search, he would be doing so under the provisions of Cr. P.C. and if there is no strict compliance with the provisions of Cr. P.C. then such search would not per se be illegal and would not vitiate the trial.

The effect of such failure has to be borne in mind by the Courts while appreciating the evidence in the facts and circumstances of each case.

(5) On prior information the empowered officer or authorised officer while acting under Section 41(2) or 42 should comply with the provisions of Section 50 before the search of the person is made and such person should be given information that if he so requires, he shall be produced before a Gazetted Officer or a Magistrate as provided thereunder. It is obligatory on the part of such officer to inform the person to be searched. Failure to inform, the person to be searched and if such person so requires, failure to take him to the Gazetted Officer or the Magistrate, would amount to non-compliance of Section 50 which is mandatory and thus it would affect the prosecution case and vitiate the trial. After being so informed whether such person opted for such a course or not would be a question of fact.

(6) The provisions of Sections 52 and 57 which deal with the steps to be taken by the officers after making arrest or seizure under Sections 41 - 44 are by themselves not mandatory. If there is non-compliance or if there are lapses like delay etc. then the same has to be examined to see whether any prejudice has been caused to the accused and such failure will have a bearing on the appreciation of evidence regarding arrest or seizure as well as on merits of the case.

8. In Abdul Rashid's case cited supra (2000 (1) Andh LD (Cri) 404) the Supreme Court again considered the effect of violation of Section 42(1) and held-

When the same decision considered the impact of non-compliance of Section 50 it was held that 'it would affect the prosecution case and vitiate the trial.' But the Constitution Bench has settled the legal position concerning that aspect in *State of Punjab v. Balbir Singh* 1994 Cri LJ 3702 (supra), the relevant portion of which has

been extracted by us earlier. We do not think that a different approach is warranted regarding non-compliance of Section 42 also. If that be so, the position must be the following :-

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 and he shall forthwith send a copy thereof to his immediate official superior. The action of the officer, who claims to have exercised on the strength of such unrecorded information would become suspect, though the trial may not vitiate on that score alone. Nonetheless the resultant position would be one of causing prejudice to the accused.

9. Therefore, from the aforesaid decisions of the Supreme Court it is clear that recording of information given by a person, in writing, or recording the grounds of his belief from the personal knowledge are mandatory requirements in case of search between sunset and sunrise and failure to comply this requirement, vitiates the entire trial.

10. In the instant case, admittedly the search took place between sunset and sunrise and the Investigating Officer did not record the information in writing when he received the same from the outsider. He only stated that he has recorded the information in General Diary, but that General Diary was not even produced for the scrutiny of the Court so as to ensure whether the officer has recorded information with regard to the matter under issue. Under those circumstances it has to be only construed that he did not record any such statement in the General Diary. He also stated that he had not inform his superior officer that he had received information. So, once it is established that there is a violation of Section 42(1), it has to be necessarily held that the entire prosecution gets vitiated. Even though there may be a case on merits, but when initial incurable defect is established, the Court need not go further into the merits of the case. The learned Public Prosecutor, however, made an attempt to convince this Court and submits that there is evidence of the Investigating Officer to the effect that he has recorded the

information in the General Diary and that itself establishes that there is a compliance. I am afraid that I cannot accept this contention. The requirement was held to be a mandatory and the Court has to satisfy itself whether such information was recorded. Mere statement in the evidence would not amount to establishing that he has recorded the information. It is to be noted that even if the General Diary had been produced, still the Court has to satisfy that the relevant information has been recorded or not. Therefore for non-production of the General Diary, the entire case of the prosecution has to fall on ground. Under these circumstances, I have to necessarily allow the appeal and set aside the judgment of the trial Court.

11. In the result, the appeal is allowed and the accused stand acquitted. The judgment of the trial Court in S.C. No. 258 of 1997 is set aside. The bail bonds of the appellants-accused shall stand cancelled and they are set at liberty if they are not required in any other case. The fine amount, if paid, shall be refunded to the appellants.

12. Before parting with the case, I make the following observations. In this case, there was gross negligence on the part of the Investigating Officer as well as the Prosecuting Agency. A huge haul of Diazepam was seized from the car and on account of a minor omission, the State has suffered great set back. The appellants-accused are now to be set free for violation of the mandatory requirements laid down under Section 42(1) of the Act. The people's faith in the governance of the State is a great asset. If the criminal cases however strong may be on merits end in acquittal on technical omissions, the public confidence gets eroded leading to failure of criminal justice system. There is no reason why the General Diary could not be produced before the Court. Neither the Public Prosecutor has taken any steps to summon the General Diary nor the Investigating Officer produced the same before the trial Court. No plausible reasons are forthcoming. This itself shows the perfunctory and lackadaisical manner in which the case was conducted. The Investigating Officer being in a rank of Inspector of Police is expected to know the investigating process. On account of lapses on his part, the entire prosecution was grounded and the appeal has to be allowed. The Public Prosecutor also failed to take minimum precautions in this case. Therefore, it is a fit case where the Government has to conduct an enquiry

as to how such lapses could have occurred on the part of the Investigating Officer and also the Public Prosecutor concerned. Therefore, I direct the Government to initiate an enquiry and take appropriate action against the officer concerned and also the concerned Public Prosecutor for the lapses as noted above.

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