

Govind Bajpayee and anr. (In Jail) Vs. State of U.P. and anr.

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Court : Allahabad

Decided On : Mar-01-2005

Reported in : 2005CriLJ3019

Judge : Umeshwar Pandey, J.

Acts : [Narcotic Drugs and Psychotropic Substances Act, 1985](#) - Sections 18, 20, 42, 42(1), 42(2) and 50; ;Excise Act - Sections 60

Appeal No. : Criminal Appeal No. 235 of 1990

Appellant : Govind Bajpayee and anr. (In Jail)

Respondent : State of U.P. and anr.

Advocate for Def. : A. G. A.

Advocate for Pet/Ap. : S.R. Singh, ;R.S. Yadav, ;P.K. Gupta, ;Pankaj Shukla, ;Rajeev Trivedi and ;A.K. Srivastava, Advs.

Disposition : Appeal allowed

Judgement :

Umeshwar Pandey, J.

1. Heard Sri Pankaj Shukla, Advocate assisted by Sri Puneet Kumar, Gupta, Advocate, appearing for appellants and learned A. G. A.

2. This appeal arises out of the judgment and order of conviction and sentence dated 30-1-1990 passed by the Additional Sessions Judge, Banda.
3. The story of the prosecution is that the appellants Govind Bajpayee and Jugal Kishor were found in possession of contraband 'Ganja' and 'Afeem' being sold at the shop of the appellant Jugal Kishor. Before actual recovery could be conducted, the appellant Jugal Kishor had slipped away from the shop and at the time of search small packets of 'Ganja' weighing 150 gms. and 'Afeem' weighing 32 gms. were recovered and taken in possession. The accused Govind Bajpayee was taken into custody and after doing the spot formalities, the complainant PW 1 Tehsildar Singh, the then. Dy. S. P. (C. O.), Banda brought the accused and recovered articles along with recovery memo etc. to the Police Station and the F. I. R. was lodged. The investigation was started and charge sheet was submitted against both the appellants. The recovered articles were sent for chemical examination, which on analysis were found to be 'Ganja' and 'Afeem'.
4. The Inquiry Officer after completing the investigation submitted the charge sheet against the appellants.
5. The prosecution in the present case has examined as many as five witnesses out of whom PW1 is the complainant PW 1, the Dy. S. P. Tahsildar Singh, who had done the recovery and lodged the F. I. R. and PW2 is the constable Shiv Kumar, who was also accompanying the complainant at the time of recovery. PWs 3 and 4 are the witnesses from public whereas PW5 S. K. Gupta is the Investigating Officer. The prosecution has also proved documents Ext. Ka-1 to Ka-4 and the recovered articles have been proved as material exhibits.
6. The appellants accused had denied to the charges for the offence punishable under Section 18/20 N. D. P. S. Act and stated that he had falsely been implicated in this case. The defence has also proved the documents Ext. Kha-1 to Kha-3.
7. It is the case of the prosecution that the aforesaid contraband narcotics substances were recovered from the shop of the appellant accused Jugal Kishore on 4-11-1987. The police party headed by PW 1 the then Dy. S. P. had received information of illegal sale of narcotics drugs namely 'Ganja' and 'Afeem' at the

shop of the appellant-Jugal Kishor in this city and thereafter he along with certain police personnel had proceeded for the spot to do the search and recovery.

8. It is submitted by the learned counsel for the appellants that if such information was received by the police officer competent to conduct the search and seizure, the formalities as required under Section 42 of the N. D. P. S. Act have to be necessarily gone into and in case, this essential requirement of the provision has not been followed the whole search and seizure will become illegal. The learned counsel has cited the following case laws :

(1) : (2000)4SCC465 , Koluttumottil Razak v. State of Kerala.

(2) (2002 (45) ACC 552), Saleem v. State of Kerala.

(3) : 2000(71)ECC459 , Ahmed v. State of Gujarat.

(4) (2001(42) A. C. C. 72), Aarti Yadav v. State of U. P.

(5) : 1999 CriLJ3672 , State of Punjab v. Baldev Singh.

9. The learned counsel has also submitted that if the police officer on such information has to take search of any person, he is required under Section 50 of N. D. P. S. Act to take such person without unnecessary delay to the nearest gazetted officer of any of the department referred to in Section 42 or to the nearest Magistrate. Learned counsel in this context submits that the complainant, PW 1 Tehsildar Singh, while had approached the shop of the accused and before he started doing the search and seizure, the appellant Govind Bajpayee was present and had not been given option/ information as was required under the aforesaid Section 50 of N. D. P. S. Act. He was not told by the Dy. S. P. that if he was agreeable, he might be taken to the nearest Gazetted Officer or the Magistrate. It is further submitted that the contraband substance, which was allegedly recovered is claimed to have been recovered from below the Takhat on which the accused Govind Bajpayee was sitting. That itself shows that it was a recovery made from the person of the accused Govind Bajpayee and as such he should have been apprised of this option as available to the accused under Section 50 of N. D. P. S. Act.

10. It is also submitted by the learned counsel for the appellants that if some search was to be taken by the persons on certain information or suspicion, that contraband was kept in a particular place, it would be incumbent upon the search party to have first taken the search among themselves to ascertain that they are not in possession of any contraband at that particular point of time, which might not be planted at the time of search. It is a safety measure, which is expected from the persons taking search that they should themselves be not in possession of any contraband or illegal article.

11. In the present case, the learned counsel submits that no such search has been taken by the complainant and other members of the police party among themselves prior to conducting the raid and search at the shop of the accused Jugal Kishor.

12. The claim of the prosecution is recovery of narcotics substance from the shop of the appellant - Jugal Kishor and for which an information was, before hand given to PW1 which obviously, he does not claim either in the F. I. R. or in his evidence before the trial Court, to have recorded and taken down in writing as is required under Section 42 of the N. D. P. S. Act. It is thus, quite evident that the requirement and obligation of Section 42 of the N. D. P. S. Act have not been discharged in the present case. The Apex Court in case of *Koluttumottil Razak v. State of Kerala*, : (2000)4SCC465 has clarified the implication of Section 42 of the Act and has specifically held that non compliance with the requirements of this Section 42(1) and (2) would render the resultant search and seizure suspect, though that by itself may not vitiate the proceedings.

13. As regards the compliance of the provisions of Section 50 of N. D. P. S. Act, it is required that while taking search of a person, the officer authorised in that behalf has some necessary duties to discharge. The said obligation cast on the search officer comes into play only in case of search of the person of an individual as distinguished from search of some premises etc. Vide *State of Punjab v. Baldev Singh*, 1999 (39) ACC 349. In the present case, the recovery of contraband has not been made from the person of the appellants but from the shop and premises over which they had their possession and were selling those articles to the

customers.

14. The arguments of the learned counsel for the appellants that since the recovery was made from below the Takhat over which the appellant Govind Bajpayee was sitting, can be constituted as a search of the person of accused, is not at all acceptable. Had the contraband been recovered from the pocket or other parts of the apparel /clothes worn by the accused Govind Bajpayee that would have been recovery from the person of the said accused, but here the recovery from below the Takhat cannot be constituted as recovery made from the person. There would hardly be any requirement of compliance to the formalities as required to be observed by the recovery officer under Section 50 of the Act.

15. For the purpose of such seizure and it is necessary for each individual of the search party to take search among themselves before proceeding with the search of the accused or his premises, which in this case has not been done. It is also possible that a member of that search party may himself be in possession of one or the other contraband which he may plant in the premises of the alleged accused. It is because of this that this safeguard measure has been recognized by the law which has not been followed in this case by the police officer while taking the search of the appellants' premises.

16. In addition to above, I find that the evidence of PW 1 is also materially contradicted by the recovery memo, which is claimed to have been prepared after recovery and seizure. In the examination in chief he states that copy of the recovery memo, which was prepared, was given to the accused Govind Bajpayee. This fact also finds reference in the recovery memo itself. But in his cross examination he states that the appellant Govind Bajpayee refused to put his signature on the said recovery memo (Ext. Ka-1). If it was the actual state of affairs that the copy of the recovery memo was given to the accused, his signature must find place upon the recovery memo. In case this signature was not put by the accused inspite of asking of the recovery officer, this fact also must find mention in the recovery memo itself. The statement of the PW 1 in the cross examination that the accused Govind Bajpayee refused to put his signature on the recovery memo, will not be accepted as a truth, as he has failed to mention this fact on the

recovery memo also. Such a statement of the witnesses if not supported by the recovery memo, which is claimed to be an important corroborative evidence, the whole theory of recovery is affected from its root. In the examination-in-chief the PW 1 has stated that a copy of this recovery memo has been given to the appellant Govind Bajpayee whereas this piece of his evidence is contradicted by PW 2 constable Shiv Kumar, who states that the copy of recovery memo when offered to the accused, he refused to take it.

17. The whole recovery further becomes suspicious by the evidence of PW4, who is said to be an independent witness. It is the claim of the prosecution that after recovery and seizure of the contraband article, it was sealed and then and there on the spot and the recovery memo was also prepared. Thereafter, the accused Govind Bajpayee along with recovered articles was brought to the Police Station. PW4- Durga Prasad in the cross examination has stated that the whole article had been brought to the police outpost along with accused and then it was sealed there only. The recovery memo was also prepared at the police outpost and he along with other witness put his signature thereon at the police outpost only. This statement of the witnesses is enough to demolish the whole theory of recovery as claimed by the prosecution and the actual manner in which the recovery is claimed to have been done by the police party, becomes highly doubtful.

18. In the aforesaid view of the matter, the trial Court does not appear to have taken right approach to the evidence available in the case and there was hardly any occasion for it to hold that prosecution had succeeded to bring home the guilt for the offences punishable under Section 18/20 of N. D. P. S. Act and Section 60 of Excise Act to the accused. I find that the evidence advanced from the side of the prosecution does not inspire confidence as to the actual mode of recovery and as such it cannot be safely held that the prosecution had succeeded to prove its case beyond doubt for the offences allegedly committed by the accused persons. In the face of such evidence about recovery, the prosecution has actually not succeeded to prove its case to the hilt and bring home the guilt successfully to the accused appellants. As such, this appeal deserves to be allowed and the judgment and order of conviction and sentence passed by the Court below requires Interference.

19. The appeal is allowed and the judgment and order dated 30-1-1990 passed by the IIInd Additional Sessions Judge, Banda, convicting and sentencing the appellants to different punishments is hereby set aside. The appellants are acquitted for the offences with which they were charged.

20. The accused appellant No. 2, Jugal Kishor is said to be in the lock up whereas the appellant No. 1, Govind Bajpayee is on bail. The appellant No. 2, Jugal Kishor would be released forthwith if not wanted in any other cases and the trial Court is directed to issue order to this effect for his release from the jail. The bonds of the accused Govind Bajpayee are hereby cancelled and the sureties are discharged.

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