

Sanjai Kumar Vs. State of U.P.

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Court : Allahabad

Decided On : Aug-11-2000

Reported in : 2001CriLJ2100

Judge : S.K. Agarwal, J.

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

Appeal No. : Criminal Appeal No. 99 of 1991

Appellant : Sanjai Kumar

Respondent : State of U.P.

Advocate for Def. : A.C.A.

Advocate for Pet/Ap. : Dileep Kumar, Adv.

Disposition : Appeal allowed

Judgement :

ORDER

S.K. Agarwal, J.

1. This appeal was filed by the appellant Sanjay Kumar against his conviction Under Section 18 of Narcotic Drugs and Psychotropic Substances Act and

consequent sentence of 10 years R.I. and a fine of Rs. 1,00,000/-. In default of payment of fine he was to under go further imprisonment for 2 years.

2. Brief facts of the case are that Excise Inspector Sri S.K. Mishra was on a routine check of the excise shops in Mohalla Moosa Nagar circle alongwith the members of his staff Constable Vishambhar Nath Upadhyay, Sheo Charan, Brijpal Singh, Prem Singh and Shiv Kumar Tiwari. At about 12.00 in the noon he learnt from an informer that in Moosa Nagar Mohalla Charas and opium are freely sold. On receiving the abovesaid information he has prepared its memo Ex. Ka-1. After preparing the memo he proceeded to the spot and reached the shop of the appellant. He picked up three persons from amongst the public present in front of the shop as public witnesses. After disclosing his credentials he asked for the search of his shop. He asked the appellant whether he wants to give his search to the Inspector himself or required the search to be conducted by a Gazetted Officer. When the appellant told him to make the search himself, the search was conducted and seizures were made. In the search of the person of the appellant 40 small packets of opium and 22 packets of Charas were recovered. Thirteen small packets of Bhang was recovered from a packet which was found at the foot of the cot. In the search of the shop from the wall of another room 100 small packets each of Charas and opium were further recovered apart from a small cake of Charas. The total weight of opium was found to be about 220 gms. It was sealed in a tin container lying in the shop itself. 122 small packets of Charas were weighed and was found about to be 300 gms. They were also sealed in a dry milk container which too was lying inside the shop. Both tin containers were wrapped independently in separate pieces of cloth and scales were put on them. The seizure memo as well as statement of the Excise Inspector shows that no signatures of the witnesses public as well as departmental were obtained on the sealed tin containers or on the cloth which was wrapped around them. Seizure memo shows that a copy of the seizure memo was given to the accused also. After completing the formalities appellant alongwith seized articles was taken to police station Kidwai Nagar. The police took the appellant into custody but declined to accept the seized articles. The reason as disclosed by the Excise Inspector in his testimony is that there was no space in the police station Maalkhana for taking these two small tin packets. After investigation chargesheet

was submitted.

3. The prosecution had examined in support of its case two witnesses who are Excise Inspector S.K. Mishra. P.W. 1 and Sri Hasan AH, a Public witness, P.W. 2.

4. The appellant had denied the allegations levelled against him by the prosecution in its totality and claimed his involvement in the offence at the instance of the Thekedar. He has produced his father. D.W. 1 regarding the age of the appellant. According to his testimony on the date of incident appellant was a minor below the age of 16 years.

5. Learned counsel for the appellant has made following submissions that Section 42 of the N.D.P.S. Act, 1985 has not been complied with in its totality. The submission is that even if the provision of sub-Section (1) of Section 42 is treated to have been complied with still second part of this Section i.e. sub-Section has remained unfulfilled. The second submission is that search itself is wholly unreliable. Two reasons attributed are that the Sessions Judge has not found sufficient cause to convict the appellant and second that there is huge deficit in the weight of Charas when it was weighed in Court in comparison to the weight disclosed in seizure memo. No witness has been produced except P.W. 2 who does not corroborate P.W. 1 on material particulars. Apart from this I have also noticed that there is absolutely no evidence brought on record by the prosecution to establish that no tampering had taken place with the sample till it was sent for analysis by Court.

6. The statement of P.W. 1 has all significance in respect of the above said argument. According to the Excise Inspector he had taken 3 public witnesses who were standing in front of the shop of the appellant but when he appeared in the witness box he was not able to give the names of any one of them. The seizure memo shows signatures of P.W. 2. Hasan AH but there is no parentage or address of this witness in the seizure memo. Another fact that is not borne out from the seizure memo is that this appellant was at any point of time asked for the compliance of Section 50 although, in my opinion, this argument is not available in the present case. Section 50 deals with clearly a search of the person of a suspect and not of a place of business. So Section 50 has absolute no application in the

present case. Here entire search was made inside the shop. Search from the person of the appellant cannot be claimed to be a search of the person of appellant since he was present inside his shop. The evidence of the Excise Inspector further shows complete lack of link evidence. His statement shows that after the refusal by the police to keep the seized articles into its Maalkhana he had not proved That these articles remained in the same state and condition in which they were lodged in the Maalkhana of the Excise department from which the sample was drawn and sent to the chemical analyst.

7. Coming to Section 42. Para 3 of his statement is significant. Statement of the Excise Inspector is that he had sent his report to the Excise Officer on 22-8-1998 in the form of a chargesheet. No where in his statement he had stated that he had submitted a copy of the inspection memo, Ex. Ka 1, to the superior officer. The language of Section 42 sub-section (2) is quoted as under for ready reference :

Where an officer takes down any information in writing Under Sub-Section (1) or records ground for his belief under the proviso thereto, he shall forthwith send a copy thereof to his immediate official superior.

8. The checks and balances prescribed by the Act cannot be obviated easily. They are the yardstick to measure the authenticity and genuineness of the activity of the official concerned. These are technical offences and onus have been shifted upon the accused persons to prove their innocence. Presumptions are drawn in favour of the prosecution than the accused. In such a situation, these measures, checks and balances, cannot be given a go by. Contrary to it they require strict adherence. Complete absence of the link evidence as to how and who took these containers containing two seized contraband articles out of the excise maalkhana and produced before the Judicial Magistrate for sending it to chemical examiner for their examination and it's determination as a narcotic substance. It further goes to establish that no proper precautions appear to have been taken by the Excise Department. It is admitted to the Excise Inspector that he himself was the incharge of Excise Maalkhana. These observations are further fortified from the fact that when the container having opium in it was opened and the packets were counted a shortage of 25 packets of opium was noticed by the Court below. In cross

examination regarding this shortage of opium packets the reply made by the Excise Inspector was that it was counted by a constable and there may have occurred a mistake in his counting. The reply did not find favour with learned Sessions Judge. This is a well thought out explanation given by the Excise Inspector in the trial Court for the first time. No entries were made regarding its deposit anywhere. The seizure memo shows clearly recovery of 140 small packets of opium. The appellant was also extended benefit of it in the form of acquittal for the possession of opium by the trial Court. It is further admitted by the Excise Inspector, P.W. 1, that he was not knowing the appellant from before although he was knowing his shop. It is further admitted to him that no description of the shop was made to him by the Mukhbir. Ex. Ka-1 clearly indicates the name of the appellant and also the shop where he was shown to have been indulging into illegal drawing of liquor and presence of such equipments apart from opium, Charas, Ganja and Bhang and other substances. In the search admittedly neither liquor nor any instruments for its drawing was found. This clearly indicates that entire statement of this Inspector was made on his own imagination. He has further admitted that he had not taken any witness of the public from the place where this Ex. Ka 1, search memo, was prepared. No information at the police station was also communicated. As earlier stated no copy of the search memo. Ex. Ka 1 was sent to the immediate official superior to him. There is a lot of discrepancy with regard to the time of search and seizure. Initially statement was that the recoveries were made from Tericot Pajama. Then it was changed that it was recovered from the Shirt and thereafter from the Pant and then again that it was recovered from the Pajama. These are insignificant facts but in the presence of shortcomings discussed above even this trivial fact assumed significance and become of importance. The statement of the Excise Inspector further goes to establish that no seal was affixed on sealed containers. No copy of the search memo was prepared. No copy was sent to any official immediately superior to him. He had further admitted that the MUKHBIR had communicated to him that at the shop of the appellant Bhang, Charas and opium was also sold. Apart from it no other article was sold by him. The Mukhbir did not inform about the liquor and Smack. He had further admitted that a mention of the equipments for drawing liquor in Ex. Ka 1 is wrong or false. He admitted that he had weighed Charas and

opium both at the spot and the weights were accordingly disclosed in this seizure memo. When at the instance of defence the container containing Charas was opened 80 small packs were found therein i.e. in the safe condition in which they were sealed at the time of seizure but the remaining 44 packets were found tampered with. This further creates Serious doubt in the authenticity of these recoveries claimed to have been made from the appellant by the Excise Inspector, P.W. 1. The testimony of Excise Inspector, therefore, too for the reasons discussed above does not inspire confidence.

9. Coming to the statement of P.W. 2 Hasan Ali as already stated while discussing the evidence of P.W. 1 that neither the parentage of this witness nor his place of residence is mentioned anywhere in the seizure memo. Apart from it Excise Inspector was not able to disclose the names of those public witnesses including P.W. 2 who were called by him before the search was made. This witness has stated that recoveries of small packets of opium and Charas were made by the Excise Inspector from the Kotha in which appellant was sitting and only some packets of opium and a cake of Charas was recovered from the wall of the adjoining room. This witness in cross-examination was unable to give out whether it was Brown Sugar or not when the recoveries were effected. He could not tell the month of the recovery. He had further stated that no papers were prepared by the Inspector, P.W. 1 before search was conducted. According to his cross examination, the entire goods seized from the person of the appellant as well as from the wall were told by this witness. He further stated that apart from a small cake of Charas which was recovered from the wall no other narcotic was recovered from there. He further stated that from the pocket of the applicant only 3-4 small packets of Charas and opium were recovered. His statement is in total conflict with the evidence of P.W. 1. This leads me to the only conclusion that there is absolutely no corroboration of the testimony of P.W. 1. Admittedly 3 persons including Hasan Ali from amongst the public were taken as witness and apart from them 5 constables also accompanied the Excise Inspector. It is beyond comprehension why any one of them was not produced especially any constable. The absence of any link evidence further dealt a severe blow to already impoverished prosecution story. Yet another circumstance under discussion now will further damage the version of the prosecution. In this case the sample was

sent through Court and it is admitted by P.W. 1 Excise Inspector, that the containers containing contrabands were not taken to the Court by him. Then definitely it was taken by some other official of the department. The packets were certainly tampered. It is obvious that the link evidence in such cases is a must. It should and must be produced by the prosecution so as to avoid any Inconvenience. In the absence of link evidence, the argument regarding tampering of the sealed narcotics is open to the appellant or accused persons. It would be thus obvious that the link evidence must be produced in evidence.

10. For the reasons discussed above the appellant deserves benefit of doubt.

11. In the result this appeal is allowed. He is acquitted. The conviction and sentence of the appellant as awarded by the trial Court in Sessions Trial No. 267 of 1980 is hereby set aside. He is on bail. He need not surrender. His personal bond is cancelled and sureties are discharged.

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