

Sanat Kumar Vs. State of M.P.

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Court : Madhya Pradesh

Decided On : Feb-11-2005

Reported in : 2005CriLJ2272; 2005(2)MPHT185

Judge : A.K. Awasthy, J.

Acts : Narcotic Drugs and Psychotropic Substances Act, 1965 - Sections 8, 22, 42, 50, 52, 55 and 57; Code of Criminal Procedure (CrPC) - Sections 374

Appeal No. : Criminal Appeal No. 122/1998

Appellant : Sanat Kumar

Respondent : State of M.P.

Advocate for Def. : Amit Upadhyaya, Adv.

Advocate for Pet/Ap. : Siddiqui, Adv.

Disposition : Appeal allowed

Judgement :

A.K. Awasthy, J.

1. Appellant-accused has filed this appeal under Section 374, Cr.PC against the judgment and order dated 15-1-1998 in S.T. No. 19 of 1996, passed by Addl. Sessions Judge, Agar, of his conviction and sentence under Section 8/22 of the

Narcotic Drugs and Psychotropic Substances Act (in short 'NDPS Act') and R.I. of 10 years and fine of Rs. 1 lac, in default of payment of fine further imprisonment for a period of 2 years.

2. The prosecution case is that on 15-8-96, at about 7 p.m. Station House Officer, Barod Bhati (P.W. 1) received secret information that the accused is carrying smak for sale and the secret information was recorded by him in the Panchnama (Ex. P-2); that the information was sent by him through Constable to S.D.O.P., Agar; that S.D.O.P., Agar went to the police station and he alongwith the S.D.O.P., Agar and the seizure witnesses proceeded to Tekri of Kwaja Saheb, where the accused was apprehended and he was apprised of his right to opt for the search by the Gazetted Officer or the Magistrate; that the accused gave in writing that he wants to be searched by S.D.O.P. and Ex. P-9 is the consent memo; that in the search of the accused in the left pocket of his trousers, a packet containing 5 gms of smak was found and after taking samples of 2-2 gms. they were sealed. The accused was then taken to the police station, where the muddemal was deposited in the Malkhana. That on 16-8-96 the sample packet was sent to F.S.L., Indore and the F.S.L. has reported, vide Ex. P-24 that the packet contained smak. After investigation the charge-sheet under Section 8/22 of NDPS Act was filed against the accused.

3. The accused abjured that guilt and denied the prosecution allegation and pleaded false implication due to enmity with the police.

4. The learned Trial Court has examined 6 witnesses on behalf of the prosecution and one witness on behalf of the defence, and it was held that the accused was found in possession of smak and he was convicted and sentenced as above.

5. The appellant has challenged the conviction on the ground that the mandatory provisions of Sections 42, 50, 52 and 57 of the Act are not followed and in view of the infraction of the mandatory provisions, the conviction is bad in law.

6. U.S. Bhati (P.W. 1) has stated that on 15-8-96 a secret information was received by him and thereafter the S.D.O.P. and he alongwith the raiding party went on the spot. The accused was apprehended and from his trouser pocket the

smak was recovered. Santosh Singh Gaur (P.W. 6) S.D.O.P. has also corroborated the aforesaid statement. However independent witnesses Sujan Singh (P.W. 2) and Bheru Singh (P.W. 3) have not stated a single word about the recovery of contraband from the accused. The prosecution has declared them hostile. The witnesses have admitted their signature on the Panchnamas (Ex. P-9 to Ex. P-19) and they have denied the police statement. Consequently, it is clear that P.W. 2 and P.W. 3 have turned hostile.

7. From the statement of U.S. Bhati (P.W. 1) and Santosh Singh (P.W. 6), it is clear that the accused was in possession of smak. There is no contradiction whatsoever in the statement of Bhati (P.W. 1) and Santosh Singh (P.W. 6) to doubt the veracity of their statement about the recovery of smak from the pocket of the accused.

8. However, the allegation of the learned Counsel for the appellant of non-compliance of Sections 42, 50, 52 and 57 of the NDPS Act, appears to be just and proper. Bhati (P.W. 1) has stated that he has apprised the accused of his right of search by the Gazetted Officer or the Magistrate. S.D.O.P. Santosh Singh (P.W. 6) has not stated that he has apprised of the right of the accused for search by the Magistrate or the Gazetted Officer. Santosh Singh (P.W. 6) has stated that he was told that he is a Gazetted Officer and he can give search either to the Station House Officer or the Gazetted Officer. In view of the aforesaid contradiction it is clear that the prosecution has failed to prove beyond reasonable doubt that the accused was apprised of his right of search by the Gazetted Officer or the nearest Magistrate.

9. Bhati (P.W. 1) has stated that he recorded the secret information in Rojnamcha (Ex. P-3) and the secret information was sent through Constable to S.D.O.P., Agar and thereafter S.D.O.P., Agar came to the police station. The prosecution has not examined the Constable who has taken the secret information from police station to S.D.O.P., Agar. S.D.O.P. Santosh Singh (P.W. 6) has also not stated that he has received the secret information from the Constable of Police Station, Barod. On the other hand S.D.O.P. has stated that he was informed on telephone by Station House Officer Bhati that the secret information was received about the

accused. Consequently, it is not proved beyond reasonable doubt that the Station House Officer, Bhati (P.W. 1) has sent the secret information through the Constable to the higher authorities. The compliance of Section 42 of the NDPS Act is also doubtful.

10. The prosecution has not examined any witness nor adduced documentary evidence to show that after the arrest of the accused the information regarding the recovery of smack from his possession was sent to the higher authorities as provided under Section 57 of the NDPS Act. Bhati (P.W. 1) has also not stated a single word regarding compliance of Section 57 of the NDPS Act. Consequently the violation of the provisions of Section 57 of the NDPS Act is evident in the case.

11. Bhati (P.W. 1) has stated that the seized contraband alongwith the samples was kept in the Malkhana of the police station. Prosecution has not examined the Head Constable of Malkhana to prove that it was kept in safe custody. The copy of the Malkhana register is also not produced. The prosecution has not examined the Constable who has taken the sample packet from the police station to FSL, Indore. There is no evidence whatsoever that before sending the sample to the FSL, Indore it was kept in safe custody in the police station and the sample remained intact and sealed.

12. Having regard to the grave consequences that may entail out of the possession of the illicit article under the NDPS Act and the severe punishment to which the accused becomes liable, the provisions of Sections 42, 50, 52, 55 and 57 of the NDPS Act are enacted and the infraction of the provisions creates a doubt about the credibility and fairness of the seizure. The search and seizure are vitiated on account of non-compliance of Sections 42, 50, 52, 55 and 57 of the NDPS Act. The learned Trial Court has not considered the infraction of the statutory provisions and as such the conviction and sentence passed by the learned Trial Court is not maintainable.

13. The appeal is allowed and the conviction and sentence are set aside, the accused be set at liberty forthwith, if not required in any other cases.

