

Pramod Vs. State of Madhya Pradesh

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Court : Madhya Pradesh

Decided On : Mar-13-2008

Reported in : 2008(3)MPHT103

Judge : A.P. Shrivastava, J.

Appellant : Pramod

Respondent : State of Madhya Pradesh

Disposition : Appeal dismissed

Judgement :

A.P. Shrivastava, J.

1. Appellant has preferred this appeal under Section 374 of the Code of Criminal Procedure against the judgment of conviction and sentence dated 9th July, 2001 passed by the Special Judge (N.D.P.S.) and the Additional Sessions Judge, Gwalior (M.P.) in Special Case No. 6/2000, by which he has been convicted under Section 8 read with Section 18 of the Narcotic Drugs and Psychotropic Substances Act (hereinafter referred to as 'the NDPS Act') 1985 and sentenced to undergo rigorous imprisonment for ten years and pay a fine of Rs. 1 lac; in default of payment of fine, he shall further undergo imprisonment for two years.

2. In brief, the story of the prosecution is that on 4.7.2000, Station House Officer D.S. Kushwah(P.W.8) P.S. Gwalior in the evening at Hazira Chowki got information that three persons on a Yamaha motorcycle bearing Regn. No. U.P.16-A-2932 are going from Jati Ki Line towards Morar and they are carrying opium beneath the seat of the vehicle. The information was recorded in the Rojnamcha Sahna No. 69/2000 at Hazira Chowki. Panchanama of the information was prepared in the presence of witnesses and a copy of the said intimation was sent to C.S.P. Thereafter, the police party reached on the spot. After some time, three persons were coming on a motorcycle, at Birla Nagar near the railway over-bridge, they were stopped and on being asked they gave out their names and the appellant was being driven the motorcycle. Notice was given for search. They gave their consent for search. After formalities, when the seat of the motorcycle was opened, one polythene bag containing some black substance was found, which was being kept beneath the seat of the vehicle. On physical test, it was found to be opium. Seizure memo was prepared on the spot and then it was weighed. The weight of black substance along-with polythene bag was found 890 gram out of which two samples of 25 gram each were taken and the substance was seized in the presence of the witnesses and sealed. Appellant and other co-accused were arrested on the spot and thereafter brought to the police station. The First Information Report Ex.P.16 was lodged at police station. After completion of the investigation, charge-sheet was filed.

3. The learned trial Court after perusal of the prosecution evidence at the conclusion of trial, convicted and sentenced the present appellant Pramod as stated in para one of this judgment and acquitted the co-accused Ramsunder @ Ram and Rakesh of the charge levelled against them.

4. Learned Counsel for the appellant challenged the conviction of the present appellant on the ground that in this case, no independent witnesses corroborated the prosecution case about the seizure from the possession of the appellant. Further, the seizure memo Ex.P.7 which was prepared by the police, is a joint seizure memo and no specific details were mentioned from whose possession the contraband article was seized. Further, the co-accused Ramsunder @ Ram and Rakesh were acquitted by learned trial Court and on the same set of evidence,

when two co-accused were acquitted, the appellant cannot be convicted because there is no proof on the record that the motorcycle which was seized by the police belongs to the present appellant and he is the owner of the vehicle. Further the exclusive and conscious possession is also not proved against the appellant.

5. Learned Panel Lawyer for the respondent-State supported the finding of learned trial Court and submits that the learned trial Court has rightly found the appellant guilty and convicted him accordingly.

6. D.S. Kushwah(P.W.8) was posted as Station House Officer at police station Gwalior, deposed that on 4.7.2000, he got information that three persons are going on a Yamaha motorcycle bearing Regn. No UP-16-A-2932 and they are carrying opium beneath the seat of vehicle. The intimation was recorded in Rojnamcha Sanha and then police party went for raid. After some time, three persons were coming on a motorcycle, they were stopped and notice was given to them regarding the search. Option was given whether they want to be searched before him or before the Gazetted Officer or nearest Magistrate. The notice is Ex.P.1 and the consent was given by them vide Ex.P.2. Then the police party searched themselves. Panchanama is Ex.P.3. Thereafter the motorcycle was searched and beneath the seat of the vehicle, one polythene bag was found in which some black substance was kept. Seizure memo was made vide Ex.P.4. On physical test, it was found to be opium and the memo is Ex.P5. The seized article was weighed and it was found to be 890 gram out of which two samples of 25 gram each of seized article were taken and sealed on the spot. Panchanama is Ex.P.6. The motorcycle was also seized through seizure memo Ex.P.7. Appellant and other co-accused were arrested by arrest memo Ex.P.8. The information was received vide Ex.P.14. After coming to the police station, the sealed packets of opium were kept in the Malkhana and the First Information Report was registered against the accused which is Ex.P16. The matter was reported to C.S.P. through Ex.P.17. Thereafter, the other formalities of the investigation handed over by Asst. Sub-Inspector Verma.

7. Assistant Sub-Inspector Ram Naresh Pachori(P.W.6) corroborated the same version as given by Station House Officer D.S.Kushwah (P.W.8) regarding the

search and seizure of contraband article from the possession of appellant-accused. Similar statement has also given by Malkhan Singh (P.W.7).

8. The independent witnesses, namely, Jai Singh (P.W.2) and Sadhu Singh Tomar(P.W.3) have not supported the seizure of contraband article from the possession of the appellant-accused. Both of them were declared hostile by the prosecution.

9. Rajaram Sakya (P.W.5) deposed that he prepared the spot map and was also taken the statements of the witnesses and sent the samples to the Forensic Science Laboratory (in short 'the FSL') Sagar through a typed copy Ex.P.12 and the report which was received from the FSL is Ex.P.13. Another witness, namely, Nabal Singh (P.W.1) was present during the proceedings as supported by the testimony of Station House Officer D.S. Kushwah (P.W.8).

10. The main contention of Learned Counsel for the appellant is that whether the joint seizure is permissible or when there is no description has been given in Ex.P.7 from whose possession the contraband article was seized. The appellant cannot be held responsible, especially two accused were acquitted by the trial Court on the same set of evidence. It is also submitted that during the investigation, the Investigating Officer has not enquired from RTO that who is the owner of the motorcycle, which is admitted by Station House Officer D.S.Kushwah (P.W.8) in his statement. The learned trial Court based its conviction on the ground that the motorcycle was taken through Supurdginama by the appellant, therefore, it is presumed that he is the owner of the vehicle and convicted him by the trial Court which is a wrong presumption. He also submits that there is violation of provision of Section 42 of the NDPS Act because the search warrant was made after the sunset and no search has been obtained or any reason has been assigned by the Investigating Officer. In this regard, he relied on the decision of the Apex Court in the case of State of Punjab v. Baldev Singh reported in 1999 SC 2378, in which it is laid down that regarding search and seizure, search conducted in violation of provisions of Section 50 of the NDPS Act. The contraband articles were seized during search, cannot by itself be used as evidence of proof of unlawful possession of the contraband. The presumption under Section 50 of the

NDPS Act from possession of illicit article cannot be raised.

11. On the contrary, it is submitted by learned Panel Lawyer for the respondent-State that appellant was the owner of the said vehicle and it was the duty of the appellant to explain how the contraband article came in his possession. In this regard, he relied on the decision of the Hon'ble High Court in the case of Mohammad Akhtar and Anr. v. State of M.P. reported in 1999(2) J.L.J. 287, in which it is held that 'charas' in large quantity was found in the dicky of car of the accused who was travelling in the said car. Seizure was made from the possession of the accused. The physical possession of contraband was proved by the prosecution. It is the burden to prove that the possession was without knowledge of accused lies on the accused. If it is not proved beyond reasonable doubt, 'culpable mental state' will be presumed.

12. The main contention regarding the contraband article which was seized from the possession of the appellant was not proved to be in exclusive or conscious possession from the appellant. Further much emphasis has been given regarding noncompliance of Section 42(1) of NDPS Act in which it provides that after sunset or after sunrise, the Searching Officer has reason to believe that a search warrant or authorization can be obtained from the Competent Authority. In this case, the Investigating Officer has not been assigned any reason for not obtaining authorization for search. Further, it is not established that the vehicle from which possession the contraband was seized is belonging to the appellant and the learned trial Court finding that the vehicle was taken by the appellant on 'Supurdginama' is not material on the basis of which it can be found that appellant was the owner of the said vehicle.

13. Regarding Section 42(1) of the NDPS Act; Sub-clause (d) lays down that:- '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 and search such building, conveyance or enclosed place at any time between sun set and sunrise after

recording the grounds of his belief.' Sub-clause (2) lays down that:-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 within seventy-two hours send a copy thereof to his immediate official superior. In this regard, Learned Counsel for the appellant relied on the decision of the Hon'ble Apex Court in the case of Baldev Singh (supra) in which the mandatory provision of the NDPS Act has been discussed in detail and the relevant portion of which has been extracted in para 17 (2-C) reads as under:

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

14. In this case, the search was made by the police on a running motorcycle which was being driven by the appellant and on search, opium was found beneath the seat of the motorcycle. Although on the motorcycle two persons were also sitting, they were made accused in the case. But, they were acquitted by the learned trial Court.

15. Now, the question is whether the provision of Section 42(1) of the NDPS Act is applicable in the present case or not. It is not in a dispute that the seizure was made in a public place when the appellant was going on a motorcycle. The Hon'ble Apex Court in the case of Directorate of Revenue and Anr. v. Mohammed Nisar Holia reported in AIR 2007 SCW 7864 has also discussed in detail about the provisions of Sections 42 and 43 of NDPS Act. Regarding the power to make search and seizure at a public place, there are requirements of Sections 42 and 43 of the NDPS Act. It is laid down by the Apex Court that distinction must be borne in mind that a search conducted on basis of prior information and case where

authority comes across incident of commission of an offence under Act accidentally. In the case of Directorate of Revenue (supra), in para 21, it is also observed by the Court that in the case of Narayanaswamy Ravishankar v. Asstt. Director, Directorate of Revenue Intelligence : 2003 CriLJ27 , while dealing with search and seizure at a public place, this Court observed.

In the instant case, according to the documents on record and the evidence of the witnesses, the search and seizure took place at the airport which is a public place. This being so, it is the provisions of Section 43 of the NDPS Act which would be applicable. Further, as Section 42 of the NDPS Act was not applicable in the present case, the seizure having been effected in a public place, the question of non-compliance, if any, of the provisions of Section 42 of the NDPS Act is wholly irrelevant.

16. In the case of Directorate of Revenue (supra), in para 13 of the judgment it is observed by the Court that requirements of Section 42 was read into Section 43 of the NDPS Act. A somewhat different view, however, was taken subsequently. Decisions were rendered opining that in conducting search and seizure in public place or a moving vehicle, provisions appended to Sub-section (1) of Section 42 would not be attracted. Decisions were also rendered that in such a case even Sub-section(2) of Section 42 need not be complied with.

17. From the testimony of Station House Officer D.S.Kushwah (P.W.8) and other witnesses who were present on the spot at the time of search and seizure, it is established that the opium was recovered from the beneath the seat of the vehicle which was being driven by the appellant. Although, the independent witnesses have not supported the possession but there is no ground to disbelieve the testimony of police witnesses from whose testimony it is proved beyond a reasonable doubt that the motorcycle was being driven by the appellant and the contraband article was found beneath the seat of the said vehicle. Thus, the appellant was in possession of the said vehicle in which the seizure of contraband article has been proved by the prosecution.

18. Now, the next question is whether the appellant had knowledge about the contraband article which was found beneath the seat of the motorcycle. The

submission of the learned Panel Lawyer for the respondent-State is that where once the possession of contraband article was proved, it is for the appellant to explain the possession in view of Section 35 of NDPS Act. Section 35 of the Act provides as under:

35. Presumption of culpable mental state -(1) In any prosecution for an offence under this act which requires a culpable mental state of the accused, the Court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.

Explanation--In this section 'culpable mental state' includes intention, motive, knowledge of a fact and belief in, or reason to believe, a fact

(1) For the purpose of this Section, a fact is said to be proved only when the Court believes it to exist beyond a reasonable doubt and not merely when its existence is established by a preponderance of probability.

19. After discussing Section 35 of the NDPS Act, it has also observed by this Court in the case of Mohammad Akhtar (supra) that the language of Section 35 of the NDPS Act is much stronger than Section 10 of the Opium Act. According to the Explanation to Section 35(1) 'culpable mental state' includes knowledge of a fact. According to Section 35(1) the Court shall presume existence of such mental state. The burden is placed upon the accused to prove the fact that he had no such 'mental state'. The degree of burden of proof is 'beyond a reasonable doubt'. In view of this statutory presumption, the prosecution is required to establish the objective facts i.e. physical control or custody. The prosecution is not initially required to prove the 'knowledge' that is to be presumed. It is also observed that possession is made of two elements; 'corpus' and 'animus'. The prosecution is required to prove the physical control and then the knowledge will be presumed unless disproved by the accused.

20. In view of the above discussion, it is found that the finding recorded by learned trial Court regarding the conviction under Section 8 read with Section 18 of the NDPS Act is based on legal evidence and does not suffer from any legal infirmity

in the finding of conviction. Therefore, looking to the above circumstances of the case and gravity of offence, the sentence as awarded by learned trial Court is also affirmed. The surety and bail bond of the appellant shall stand cancelled. He is directed to surrender before the trial Court to serve out the remaining part of sentence. Appeal is dismissed accordingly.

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