

Devilal Vs. State of M.P.

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Court : Madhya Pradesh

Decided On : Feb-07-2002

Reported in : 2002(84)ECC771; 2002(2)MPHT186; 2002(2)MPLJ301

Judge : N.K. Jain, J.

Acts : [Narcotic Drugs and Psychotropic Substances Act, 1985](#) - Sections 8, 18 and 50

Appeal No. : Criminal Appeal No. 1008/96

Appellant : Devilal

Respondent : State of M.P.

Advocate for Def. : M. Upadhyaya, Adv.

Advocate for Pet/Ap. : C.R. Joshi, Adv.

Disposition : Criminal appeal allowed

Judgement :

N.K. Jain, J.

1. Accused/appellant Devilal is convicted under Sections 8/18 of the [Narcotic Drugs and Psychotropic Substances Act, 1985](#) (for short 'the Act') and sentenced to 10 years RI with fine Rs. 1,00,000/- by the 1st Addl. Sessions Judge, Neemuch

vide his judgment dated 7-10-96 in Special Case No. 139/93 which is impugned in this appeal.

2. The case of the prosecution, as unfolded at the trial, was that on 1-4-1993 at 11.30 p.m. in the night, Sub-Inspector Anilsingh Rathore (P.W. 8) of P.S. Singoli, acting on the basis of information received from an approver intercepted the accused appellant on way near Village Thadod-Phata and after observing necessary formalities/requirements, searched him in presence of two panch-witnesses. Two bags, tied around the waist underneath wearing apparels, were recovered from the person of the accused. On preliminary examination both the said bags were found containing opium weighing 870 and 660 gms., respectively. Two samples each of 30 gms. were drawn from the said bags which were then sealed and seized duly on the spot. On return at the police station, FIR vide Ex. P-15 was lodged and scribed by Sub-Inspector Rathore himself who also proceeded with further investigation in the case. On chemical analysis the seized contraband was found to be opium. After other necessary investigation, accused appellant was charge-sheeted and committed for trial which ended into his conviction and sentence as aforesaid.

3. The prosecution examined Bothelal (P.W. 6), Panch-witness of the said seizure, and A.S.I. Bhajendrasingh Chouhan (P.W. 7) besides Sub-Inspector Anilsingh Rathore (P.W. 8) who all have narrated the prosecution story already stated hereinbefore. Their evidence is, however, criticised severely by learned counsel for appellant and it was contended that their evidence inspired little or no confidence. It was vehemently contended that mandatory provision of Section 50 of the Act was not complied with inasmuch as there is no reference of it in the seizure memo and the FIR. It was further pointed out that the police had used partisan witnesses to witness the search inasmuch as Bothelal (P.W. 6) was having litigation with the accused appellant at the relevant time. It was, thus, a case of false implication, submitted the counsel.

4. Taking the first point first (regarding compliance of Section 50 of the Act) what Sub-Inspector Rathore had stated is only this that he had asked the accused that he may give search to him and may also gave his search to a gazetted officer or

the Magistrate. More or less similar statement was made by A.S.I. B.S. Chouhan (P.W. 7), Panch-witness Bothelal (P.W. 6) merely stated that the accused was informed that if he so chooses, he may get himself searched by a higher officer. All this even if taken on face value, I am afraid, fell much short of the mandate contained under Section 50 of the Act. Neither of these witnesses has stated that the accused was informed of his right being searched in presence of a gazetted officer or a Magistrate. Hon'ble Supreme Court in K. Mohanan [2001 (2) EFR 219] has held :

'If the accused, who was subjected to search was merely asked whether he required to be searched in the presence of a gazetted officer or a Magistrate, it cannot be treated as communicating to him that he had a right under law to be searched so. What P.W. 1 has done in this case was to seek the opinion of the accused whether he wanted it or not. If he was told that he had a right under law to have himself searched what would have been the answer given by the accused cannot be gauged by us at this distance of time. This is particularly so when the main defence adopted by the appellant at all stages was that Section 50 of the Act was not complied with.'

5. As already pointed out in the instant case also the accused was also not informed about his right to get himself searched in presence of a gazetted officer or a Magistrate.

6. Even otherwise the evidence of prosecution witnesses above on this point inspired little or no confidence. At the first place Panch-witness Bothelal (P.W. 6) does not support the evidence of two police officers. Secondly, no reference in this regard is found either in the seizure-memo (Ex. P-9) or the FIR (Ex. P-15). Although a separate memorandum (Ex. P-8) is said to have been recorded in this regard but the same appeared to an empty formality and the possibility of such a document being prepared ante-dated and ante-timed, could not be ruled out. The Supreme Court in T.P. Razak [1996 (2) EFR 80], in almost similar fact situation, has held that failure to mention the fact of compliance of Section 50 of the Act in the FIR as well as in seizure-memo would render the prosecution evidence in this regard highly doubtful.

7. It will be, thus, seen that there was no compliance of Section 50 of the Act which is mandatory in nature. The entire search and the investigation was, thus, rendered illegal and the accused appellant is entitled to be acquitted on this short ground alone.

8. Coming to the merits of the evidence, witness Bothelal (P.W. 6) in Paragraph 28 of his cross-examination, has clearly admitted that some litigation was going on in between him and accused appellant at the relevant time. Under the circumstance, this witness cannot be termed as independent witness and use of such witness for the purpose of search of the accused also caused shadow of doubt on the credibility of the police officers conducting the search. The other Panch-witness of the said search had not been examined in evidence and no reason has been assigned for his non-examination. Presumably, he would not have supported the prosecution story, if examined in evidence. This also renders prosecution case doubtful.

9. There is yet another infirmity in the prosecution case. The defence all through, as maintained, that the place from where the accused was caught, fell in the State of Rajasthan and beyond the territorial jurisdiction of Police Station, Singoli. Although the police officers concerned as also the Panch-witness Bothelal had denied this fact but the village Patwari Omprakash (P.W. 1) who was asked to prepare the spot-map (Ex. P-I) has in Paragraph 6, clearly admitted that the place marked as 'B' to 'B' in the spot-map (this is the place of occurrence according to the prosecution), was actually situated in the territory of the State of Rajasthan. If that is so, Sub-Inspector Rathore of Madhya Pradesh Police had no jurisdiction to apprehend the accused and undertake the search in question. On this ground also the search and the investigation was vitiated.

10. For what is said above, this appeal succeeds and is allowed. The impugned conviction and sentence passed against accused-appellant Devilal are set-aside and he is acquitted of the charge under Sections 8/18 of the N.D.P.S. Act. He is in jail and he be set at liberty forthwith, if not required in any case.