

Pushparaj Vs. State of Madhya Pradesh

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Court : Madhya Pradesh

Decided On : Mar-09-2007

Reported in : 2007(3)MPHT303

Judge : A.K. Saxena, J.

Appellant : Pushparaj

Respondent : State of Madhya Pradesh

Disposition : Appeal allowed

Judgement :

A.K. Saxena, J.

1. Being aggrieved by the judgment of conviction and sentence passed on 9-1-1993 by the Sessions Judge, Narsinghpur in Sessions Trial No. 192/92, the appellant preferred this appeal. The appellant/accused Pushparaj has been convicted under Section 18 of the NDPS Act (hereinafter referred to as 'the Act') and sentenced to undergo 10 years rigorous imprisonment and fine of Rs. one lac and in default, one year rigorous imprisonment.

2. Prosecution story in brief is that on 2-5-1992, Sub-Inspector P.W. 1, S.K. Shrivastava received an information that the appellant/accused Pushparaj is selling opium in his house. This message was recorded in Rojnamcha Sanha and

thereafter, he proceeded towards the house of appellant/accused with police force and witnesses. When he reached at the house of appellant, the Sub-Inspector found that the appellant is sitting on empty jute bag. He informed the appellant that search can be made by the Gazetted Officer, but the appellant agreed for search to be taken by the Sub-Inspector. Thereafter, search of Sub-Inspector and his staff members was taken and then, Sub-Inspector lifted the empty jute bag and the opium was found under it. The opium was seized and seizure memo (Exh. P-3) was prepared. Thereafter, the house of the appellant was searched, but nothing was found in the house. The appellant/accused Pushparaj was arrested and arrest memo (Exh. P-5) was prepared. The Sub-Inspector registered the crime and the report (Exh. P-6) was lodged. The opium was sent to Chemical Examiner of Government Opium & Alkaloid Works, Neemuch, vide memo (Exh. P-8) on 23-6-1992, from where the report (Exh. P-13) was sent in which, opium was confirmed. Charge-sheet was filed and after recording of statements of witnesses, the Trial Court pronounced the judgment and the appellant was convicted as above.

3. The appellant has preferred this appeal on the grounds that the alleged contraband article was not seized from the possession of appellant. The seizure memo (Exh. P-3) and Panchnama (Exh. P-4) were not prepared at the spot. The statement of P.W. 7 Ramkesh is against the prosecution story. The mandatory provisions of NDPS Act have not been complied with. The prosecution evidence is not believable at all.

4. P.W. 1 S.K. Shrivastava, Sub-Inspector deposed that on 2-5-1992, he received the information that Pushparaj is selling opium in his house and this information was entered into Rojnamcha Sanha of which true copy is Exh. P-17. Thereafter, he reached at the house of appellant with staff and witnesses and he found that the accused Pushparaj was sitting on the empty bag where notice (Exh. P-1) was served on him. He informed about the right of the accused to be searched by the Gazetted Officer, but the appellant accorded his consent (Exh. P-2) that search can be taken by the Inspector himself and thereafter, the opium was seized from the possession of the appellant.

5. Learned Counsel for the appellant relied on the case of Avtar Singh and Ors. v. State of Punjab 2003-04 Cr.LR (SC) (Suppl.) 454 and submitted that if the accused was sitting on the bag, it cannot lead to presumption that he was in conscious possession of the articles. First of all, in my opinion, the principle laid down in this case is not applicable to the present case because, the facts of both the cases are totally different. Apart from that, if the appellant did not try to run away from the place of incident or he did not raise an objection, it does not mean that the appellant was not in conscious possession of the article. In the present case, it has been disclosed that the appellant was sitting in his house on the empty bag and under that bag, the opium was found. If the prosecution has proved these facts in this case, it would certainly mean that the appellant was in conscious possession of the contraband article and if it could not be proved beyond reasonable doubt then certainly, the appellant would be entitled to benefit of doubt.

6. Learned Counsel for the appellant further argued that the family members of the appellant were residing in the house and if contraband was found, it cannot be held that the appellant was having exclusive possession over it. This argument has got no force in this case also because, it is not the case of prosecution that the contraband article was found in the house at the time of search of the house. It is the case of the prosecution that the contraband article was found under the jute bag on which the appellant was sitting. Therefore, the facts of the case are sufficient to discount the arguments advanced on behalf of appellant.

7. It was further argued that before registration of the crime, the seizure memo (Exh. P-3) was prepared and in this memo, the crime number has been mentioned, which was not possible. It shows that this seizure memo was prepared after registration of crime. This argument is not sufficient to disbelieve the seizure memo because P.W. 1, S.K. Shrivastava was not cross-examined on this point at all. There may be several circumstances in which the crime number can be mentioned in such type of memos, but if a witness who prepared that memo, has been examined in the Court and the defence failed to cross-examine the witness on that point, it cannot be presumed that the seizure memo was prepared after registration of crime. In these circumstances, an adverse inference could not be drawn in respect of seizure memo (Exh. P-3) in this case on above ground.

8. It is the case of the prosecution that after seizure of contraband article from the possession of the appellant Pushparaj and after preparation of seizure memo (Exh. P-3) at 9.35 P.M., the search memo (Exh. P-4) was prepared at 9.50 P.M. In this memo, it has been disclosed that before taking search, the Sub-Inspector and the staff members have given their search, but in this memo, it has not been disclosed as to who took the search of these persons. Apart from that, no document was prepared to show that after preparation of documents (Exh. P-1 and Exh. P-2) and before taking search of appellant, the search of the Sub-Inspector and other persons was taken by the appellant. In other words, no document was prepared to show that before taking search of appellant, the Sub-Inspector, staff members and the witnesses were searched by the appellant. This is a great weakness in the case of prosecution.

9. It is apparent that search was taken during night time and it was not disclosed either in the report (Exh. P-6) or Rojnamcha Sanha report (Exh. P-7) that it was necessary to take search immediately without obtaining search warrant from the authority. Section 42 of the Act provides that:

if such officer has reason to believe that a search warrant or authorisation 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 sun rise after recording the grounds of his belief.

This important provision of the Act has not been complied with in this case. The Investigating Officer failed to record the grounds of his belief and even he failed to disclose any ground for not obtaining search warrant. The negligence on the part of Investigating Officer with regard to abovementioned fact is fatal to the case of prosecution.

10. The information was received by the Investigating Officer that Pushparaj is selling opium in his house, but this information was not received by him that the opium was kept under the empty jute bag on which the Pushparaj was sitting. In these circumstances, the normal course would be to take search of Pushparaj and if contraband article was not found then only, the empty bag could have been

searched, but instead of doing so, the Sub-Inspector directly lifted the empty bag. This was unnatural act of this witness.

11. The Trial Court found in Para 9 of the judgment that it was not at all necessary to give any information with regard to right of the accused as provided under Section 50 of the Act because personal search of the accused was not taken. This finding is erroneous because it was not in the knowledge of Sub-Inspector that where the opium is kept. First of all, it was duty of the Sub-Inspector to take personal search of the appellant and for that, the provisions of Section 50 of the Act must have been followed.

12. Without taking personal search of the appellant and without having any information as to where the opium was kept, the search of empty bag was taken by the Sub-Inspector which is highly suspicious and in these circumstances, the statement of P.W. 1, S.K. Shrivastava is not believable.

13. P.W. 2, Ramkesh tried to support the statement of P.W. 1, S.K. Shrivastava, but ultimately, I found that the statement of this witness is not trustworthy at all. He does not know the area of house of the appellant. He also denied that Sub-Inspector did ask the appellant to take search and he does not know what was written in all the documents and which of the documents he signed firstly. He admitted that after recovery of black substance, he signed all the documents. This witness was not declared hostile by the prosecution and the various admissions made by this witness in his cross-examinations, are sufficient to disbelieve the whole prosecution story.

14. P.W. 1, S.K. Shrivastava took the search on 2-5-1992, but on seizure memo (Exh. P-3) there is no sample of seal. This shows that the contraband article was not sealed after preparation of seizure memo and the process of sealing of contraband article also does not find support from the statement of P.W. 2, Ramkesh. P.W. 1, S.K. Shrivastava has admitted that the contraband was weighed afterwards and the Panchnama (Exh. P-12) was prepared. On a perusal of this Panchnama, I found that this Panchnama was prepared on 18-5-1992, whereas the contraband was seized on 2-5-1992. It means, from 2-5-1992 to 17-5-1992 the contraband was not in sealed condition. In the case of Ouseph v. State of

Kerala (2004) 10 SCC 647, it has been held as follows:

3. Learned amicus curiae appearing for the appellant contended before us that the alleged contraband unsealed were kept with the investigating agency from 14-9-1990 till 28-11-1990 nearly two months without being sealed, therefore, there is every possibility of the same being tampered with. The Courts below have rejected this argument on the ground that such a huge quantity of cannabis, nearly 5 kilograms could not have been purchased by the investigating agency to implicate the appellant forgetting that there is a statutory requirement to seal the seized articles. Under the provisions of Section 55 of the said Act, this requirement may not be mandatory but on facts of this case, keeping the contraband articles in an unsealed condition for such a long time creates doubt in our mind. The period of non-sealing in the circumstances of this case does give rise to a doubt that there might have been a possibility of tampering which cannot be ruled out, more so because sample sent to the Chemical Examiner is a small quantity. The Trial Court proceeded on the basis that from the statement of the police it showed that it was kept in a safe place, therefore, no prejudice has been caused to the appellant. The prejudice in our opinion is apparent if the seized articles are different from the articles sent to the Chemical Examiner which in this case we cannot say with certainty that the said manipulation has not happened.

15. In the present case also, it is very much clear that the contraband article was not sealed at the place of incident or before preparation of Panchnama (Exh. P-12). The prosecution has totally failed to prove that the contraband substance was sealed which was found from the possession of the appellant, therefore, these circumstances give rise to a doubt that the substance or article was tampered with in absence of appellant.

16. P.W. 1, S.K. Shrivastava, the Investigating Officer has totally failed to file any documentary evidence to show whether the contraband article was deposited in the Malkhana of Police Station and when it was taken out from the Malkhana. It was necessary to counter the allegations of tampering with the seized article by producing all the relevant documents and if the relevant evidence is not produce, oral evidence has got no importance. In absence of relevant evidence, only this

can be presumed that the contraband article might have been tampered with at any time before sending it for chemical examination.

17. The abovementioned facts are sufficient to reach at the conclusion that the prosecution has totally failed to prove beyond reasonable doubt that the appellant was having any contraband article in his possession on 2-5-1992. In these circumstances, this would be the only conclusion that the Trial Court has erred in holding that the appellant/accused Pushparaj committed an offence punishable under Section 18 of the Act. Since the prosecution has miserably failed to prove the guilt of the appellant beyond reasonable doubt, therefore, the appellant is entitled to get benefit of doubt.

18. For the aforesaid reasons, the appeal is allowed and the judgment of the Trial Court is set aside and the appellant/accused Pushparaj is acquitted of the charge under Section 18 of the Act. If the fine was deposited by the appellant, it shall be refunded to him. The appellant is on bail, therefore, his bail bonds are discharged.

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