

Dharmu Vs. State of M.P.

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Court : Madhya Pradesh

Decided On : May-12-2000

Reported in : 2000(2)MPHT398

Judge : S.P. Khare, J.

Acts : [Narcotic Drugs and Psychotropic Substances Act, 1985](#) - Sections 20, 37, 42, 43, 47, 50, 51 and 57; [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 2, 4(2), 156(1), 173 and 465; Terrorist and Disruptive Activities (Prevention) Act, 1985; [Arms Act, 1959](#) - Sections 25

Appeal No. : Criminal Appeal No. 2407/99

Appellant : Dharmu

Respondent : State of M.P.

Advocate for Def. : S.K. Rai, Panel Lawyer

Advocate for Pet/Ap. : Prafull Bharat, Adv.

Judgement :

S.P. Khare, J.

1. Appellant-Dharmu has been convicted under Section 20(b)(i) of the Narcotic Drugs and Psycho tropic Substances Act, 1985 (hereinafter to be referred to as

the 'Act') and sentenced to rigorous imprisonment for three years and to a fine of Rs. 5,000/-.

2. After hearing the learned counsel for both the sides and after careful scrutiny of the evidence on record, this Court is of the opinion that the conviction of the appellant for the aforesaid offence is well merited. T.S. Thakur (P.W. 1) was the A.S.I. at Bastar Chouki. He has deposed that on 14-1-1999 he was on duty in the weekly market and he saw accused Dharmu carrying two bags in a 'Kavar'. He asked the accused about the contents of the bags and he told him that there is Ganja in the two bags. He served the notice (Ex. P-3) on him apprising him of his right to be searched by a Magistrate or a Gazetted Officer. The accused opted to be searched by him. He searched the bags and found Ganja therein. It was weighed. There was five kilograms of Ganja in each bag. He took out sample from each bag and sealed it. He sent the report of search and seizure to the immediate official superior as per Ex. P-14. The samples were sent in sealed condition to the Forensic Science Laboratory and as per report (Ex. P-17) of the Assistant Chemical Examiner the commodity was found to be Ganja.

3. Section 42 of the Act is not attracted in the present case as the search was not from any 'building, conveyance or enclosed place'. The search was made in a public place in the weekly market. Section 43 applies to the seizure in a 'public place'. There was proper compliance with Sections 50 and 57 of the Act. The two Panch witnesses Anantram (P.W. 2) and Urdav (P.W. 4) have not supported the prosecution case. The testimony of the police officer in this case is fully reliable and that is supported by the documents prepared on the spot. The recovery of ten kilograms of Ganja from the possession of the accused is fully established.

4. It has been argued on behalf of the appellant that after the search and seizure by the A.S.I. there should have been further investigation by another police officer. Reliance is placed on the decision of Rajasthan High Court in *Nathiya v. State* (1992 (1) Crimes 537). In this case it has been held that 'justice and fairplay' require that the investigation should have been carried out by an 'independent officer' who was not in any way a party to the recovery proceedings.

5. Section 51 of the Act provides that the provisions of the Code of Criminal Procedure, 1973 shall apply in so far as they are not inconsistent with the provisions of the Act to the 'searches and seizures' made under the Act. According to Section 37 every offence punishable under the Act shall be 'cognizable'. Section 42 of the Act authorises 'an empowered officer' to effect search and seizure. Section 156(1) of the Code gives power to a police officer to investigate any 'cognizable case'. According to Section 4(2) of the Code the offences under 'any other law' shall be investigated according to the provisions of the Code subject to the provisions of the other law. The term 'investigation' has been defined in Section 2(h) of the Code as including all proceedings under the Code for collection of evidence conducted by a Police Officer. In *H.N. Hussain v. State of Delhi* (AIR 1955 SC 196) the Supreme Court has held that under the Code 'investigation' consists of the following steps : (1) Proceeding to the spot, (2) Ascertainment of the facts and circumstances of the case, (3) Discovery and arrest of the suspected offender, (4) Collection of evidence relating to the commission of the offence which may consist of (a) the examination of various persons (including the accused) and the reduction of their statements into writing, if the officer thinks fit, (b) the search of places or seizure of things considered necessary for the investigation and to be produced at the trial, and (5) Formation of the opinion as to whether on the material collected there is a case to place the accused before a Magistrate for trial and if so taking the necessary steps for the same by the filing of a charge-sheet under Section 173.

6. Thus from the scheme of the Act and the Code it is clearly spelt out that an authorised police officer has the right and duty to conduct investigation in all its stages. In *Bhagwan Singh v. State of Rajasthan* (AIR 1976 SC 985) on which reliance has been placed by Rajasthan High Court in the decision referred above there was a different situation. In that case bribe money was offered to a Head Constable and he himself investigated the case. The Supreme Court regarded this as a rare and exceptional case 'resulting in serious miscarriage of justice'. Therefore, as observed by Delhi High Court differing from the view taken by Rajasthan High Court 'it is not possible to lay down any such broad proposition of law that in no case investigation should be done by the officer who effects the recovery'. (*B.J. Framous v. State*, (1999) 2 Crimes 778). The Division Bench of

Bombay High Court has also taken the same view as that of Delhi High Court in *Ali Hussain v. State of Maharashtra* (1993 Cr. L.J. 277). In a later decision *Chhoturam v. State of Rajasthan* (1995 Cr.L.J. 819) the Rajasthan High Court has taken the same view. It has been held in this later decision that the Act does not envisage the investigation by two separate persons - one upto the stage of arrest of the accused, search and seizure and thereafter by another officer.

7. There is a decision of the Supreme Court in *Megha Singh v. State of Haryana* (AIR 1995 SC 2339). That was a case under Terrorist and Disruptive Activities (Prevention) Act, 1985 and Section 25 of the [Arms Act, 1959](#). A pistol and the cartridges were said to have been recovered from the accused by Shrichand Head Constable. The Supreme Court found that it was on the complaint of the Head Constable that a formal F.I.R. was lodged and the case was initiated. It has been observed that the Head Constable being complainant should not have proceeded with the investigation of the case. It is in that context that it has been further observed : 'Such practice, to say the least, should not be resorted to so that there may not be any occasion to suspect fair and impartial investigation'. That is not the position here. The A.S.I. who recovered the Ganja from the possession of the accused is not the complainant. Under the law he was an empowered officer to conduct the search of the accused. He did his duty. He arrested the accused and brought him to the police station. Therefore, he could carry on the rest of the investigation. In *State of Punjab v. Balbir Singh* (1994 Cr.L.J. 3702) it has been held by the Supreme Court that when a Police Officer carrying on the investigation including search, seizure or arrest empowered under the provisions of the Code comes across a person being in possession of the narcotic drugs or psychotropic substances then two aspects will arise. If he happens to be one of those empowered officers under the NDPS Act also then he must follow thereafter the provisions of the NDPS Act and continue the investigation as provided thereunder. Therefore, in the opinion of this Court the recovery and further investigation can be carried on by the same Police Officer unless he is biased or has any personal interest. The search and seizure are steps in the 'investigation' and there is no law or jurisprudential principle that after the search and seizure the Police Officer doing so should withdraw from the case and entrust further investigation to another Police Officer. There is no prejudice in such a case to the accused and

therefore, Section 465 of the Code cures it even if it is held that there is any irregularity in such investigation.

8. It was also argued that the A.S.I. in the notice (Ex. P-3) had restricted the choice of Gazetted Officer to C.S.P.. The accused was given the choice to be searched before a Magistrate also but he exercised the option of being searched by the A.S.I.. Therefore, there was no question of search by a Gazetted officer. It has been held by a three Judge Bench of the Supreme Court in Raghbir Singh v. State of Haryana, (1996) 2 SCC 201, that the choice of the Gazetted officer is with the Investigating Officer and not with the accused.

9. The conviction of the appellant for the aforesaid offence is unassailable. The sentence of rigorous imprisonment of three years is, however, reduced to two years and the fine is reduced to Rs. 2,000/-.

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