

Bhanwar Singh and Salim and anr. Vs. Narcotics Control Bureau

Bhanwar Singh and Salim and anr. Vs. Narcotics Control Bureau

SooperKanoon Citation : sooperkanoon.com/508666

Court : Madhya Pradesh

Decided On : Aug-07-2009

Reported in : 2010(1)MPHT320

Judge : S.I. Kochar, J.

Appellant : Bhanwar Singh and Salim and anr.

Respondent : Narcotics Control Bureau

Judgement :

S.I. Kochar, J.

1. Since both the aforesaid appeals arise out of one and the same judgment, therefore, they are being decided by his common judgment.

2. The appellants have preferred this appeal under Section 374 of the Cr.PC against the judgment dated 31-10-95 passed by learned Sixth Addl. Sessions Judge, Ujjain in Sessions Trial No. 202/93, whereby all the three appellants have been convicted under Section 29 of the Narcotic Drugs and Psychotropic Substances Act (for short hereinafter referred to as 'the Act') and each is sentenced to under go R.I. for ten years and to pay a fine of Rs. 1,00,000/-, in default of payment of fine to suffer additional R.I. for one year and appellant Salim is also convicted under Section 21 of the Act and is further sentenced to suffer R.I. for ten years and to pay a fine of Rs. 1,00,000/-, in default of payment of fine to

suffer additional R.I. for one year. All the substantive jail sentences have been directed to run concurrently.

3. Briefly stated, the prosecution case unfolded before the Trial Court is that in the month of July, 1993, the then Assistant Director B.N. Mishra of Narcotics Bureau, Delhi received information that the appellants were doing smuggling of heroin and going to sell it in Mandsaur. On this information, he formed a team consisting of witnesses Shri Bhattacharya and Ratanchand. They reached at Mandsaur. In Mandsaur, they received further information that the appellants were operating in Nagda, therefore, they reached to Nagda. In Nagda, they received information that two persons would be alighting at Nagda Railway Station with heroin and appellant Bhanwar Singh would contact them. Shri Mishra directed Shri Bhattacharya (P.W. 3) to have a watch on accused persons. Bhanwar Singh met the appellants Salim and Nasir on Railway Station and all the three proceeded towards Chandralok Hotel. At that moment raiding party consisting officers of respondents Shri Ratanchand, Bhattacharya and B.M. Mishra and others and stopped the appellants. The appellants were apprised about information received by the raiding party. Investigating Officer apprised the appellants about their right to be searched in presence of a Magistrate or a Gazetted Officer and appellant Salim gave his consent to be searched in presence of a Gazetted Officer. Investigating Officer informed the appellants that Gazetted Officer was Shri B.M. Mishra and that search can be made in his presence. Appellant Salim gave his consent and he was carrying a bag (Plastic Ka Thela) which was searched. In the said bag, in total 4.700 Kgs. heroin was found in five plastic bags wrapped by a cloth. Relevant documents about search, seizure and other proceedings were prepared. Statement (Exh. P-1 1) of appellant Salim under Section 67 of the Act was got recorded by R.C. Gupta and appellant Bhanwar Singh and Nasir themselves written their statements vide Exhs. P-12 and P-13, in presence of witnesses. From each packet, two samples each weighing 5 grams were taken and kept in a polythene packet, thereafter in plain envelope in presence of witnesses. Proceeding of seizure and sealing was completed. Chits containing signatures of Seizing Officer and witnesses were affixed on the samples and entire quantity of heroin. The proceeding to this effect Exh. P-4 was recorded. Seal of NCB 08 was used. Appellants in their statements made confession about conspiracy and

possession of heroin. They also admitted that the heroin was to be sold to one Prathviraj Singh. The appellants and Raiding Party returned back to the office of respondent and seized property was deposited in the Malkhana. Out of the seized property, one sample of each packet total five in number marked as A-1, B-1, C-1, D-1 and E-1 were sent to Government Authorized Laboratory, Delhi and its report is Exh. P-3 confirming the sample to be of heroin containing diacetyl morphine. On completion of investigation, charge-sheet was filed against the appellants for commission of the offences punishable under Sections 8/21 and 29 of the Act.

4. Appellants denied their complicity with the offence. They did not examine any witness in defence. Learned Trial Court, after examining the prosecution witnesses and hearing both the parties, convicted and sentenced the appellants as mentioned hereinabove.

5. Learned Counsel for the appellants have canvassed three legal points for consideration, viz., (1) Non-compliance of Section 42 (2), (2) non-compliance of Section 50, and (3) that the statement recorded under Section 67 of the Act cannot be relied upon.

6. On the other hand, learned Counsel for the respondent has supported the impugned judgment and finding arrived at by the learned Trial Court. According to him, there is absolutely no fault in the judgment warranting interference by this Court.

7. On careful examination and perusal, of the statements of the prosecution witnesses especially Ratanchand (P.W. 2), K. Bhattacharya (P.W. 3) and B.M. Mishra (P.W. 4) and other witnesses, it is clear that the contraband article was kept in a bag (Jhola) which was being carried by appellant Salim. The contraband article was not found on personal search, meaning thereby the search of body of the appellants, it was kept in a bag and the appellant was holding the bag by hand, therefore, provisions of Section 50 of the Act would not be applicable. Section 50 of the Act is applicable only when search of person of accused is taken and person does not mean bag, attachi, Potli, Gathari briefcase etc. If the accused is carrying these articles wherein narcotic drugs is kept, then compliance of Section 50 is not necessary and accused is not required to be apprised of his right of being

searched in presence of a Magistrate or a Gazetted Officer. This controversy has been set at rest by three Judges Bench of Supreme Court in the case of State of Himachal Pradesh v. Pawan Kumar and State of Rajasthan V. Bhanwarlal (2005) SCC (Cri) 943. In view of conflicting opinions, reference was made to Larger Bench and Hon'ble Mr. Justice G.P. Mathur speaking for the Bench has observed in Para 26 as under:

8. 'The Constitution Bench decision in Pooran Mal v. Director of Inspection was considered in State of Punjab v. Baldev Singh and having regard to the scheme of the Act and especially the provisions of Section 50 thereof, it was held that it was not possible to hold that the judgment in the said case can be said to have laid down that the 'recovered illicit article' can be used as 'proof of unlawful possession' of the contraband seized from the suspect as a result of illegal search and seizure. Otherwise, there would be no distinction between recovery of illicit drugs, etc. seized during a search conducted after following the provisions of Section 50 of the Act and a seizure made during a search conducted in breach of the provisions of Section 50. Having regard to the scheme and the language used a very strict view of Section 50 of the Act was taken and it was held that failure to inform the person concerned of his right as emanating from Sub-section (1) of Section 50 may render the recovery of the contraband suspect and sentence of an accused bad and unsustainable in law. As a corollary, there is no warrant or justification for giving an extended meaning to the word 'person' occurring in the same provision so as to include even some bag, article or container or some other baggage being carried by him.'

[Also see : : (2009) 7 JT 73 and K. Chitthayan v. State of Tamil Nadu (2009) 1 SCC (Cri) 393].

9. The appellant was intercepted and searched in public place in day time, therefore, provisions of Section 42 of the Act would not be applicable when the search of any building, conveyance or enclosed place was taken between sunrise and sunset. For the purposes of search, seizure, and arrest in a public place, Section 43 of the Act is applicable as held by the Supreme Court in the case of K. Chitthayan (supra). In this view of the matter, in the instant case, there is no

breach of provisions of Section 42 of the Act.

10. The independent Panch witnesses Mangilal (P. W. 6) and Lal Singh (P.W. 7) have not supported the prosecution case and were declared hostile though they have admitted their signatures on all the documents of search, seizure and sealing. Now-a-days this is a common phenomenon that independent witnesses are normally turning hostile. It is well settled legal position that the police witnesses are the witnesses of department, cannot be disbelieved unless there are compelling reasons and positive malafides or bias towards the accused, is established objectively. In the instant case, in the statement of witnesses of raiding party, Ratanchand (P.W. 2), Officer of Narcotic Bureau K. Bhattacharya (P.W. 3) and Investigating Officer B.M. Mishra (P.W. 4), Superintendent of Police, CBI Narcotics Bureau, Delhi have specifically stated about information received and raid on the spot, meeting of appellants Nasir and Bhanwar Singh with appellant Salim and in search of Salim finding of 4.700 Kgs. of heroin. Their evidence has been fully corroborated by the statement of Assistant Chemical Examiner Shri D.K. Bansal (P.W. 1), who proved the reports (Exhs. P-2 and P-3) and he found samples in intact condition, properly sealed and seal was tallying with the fascimile seal. In cross-examination of this witness, there is nothing to discard his testimony. Heroin was seized on 17-7-93, samples were also taken on the same day and on 20-7-93, same were received by Central Revenue Control Laboratory, New Delhi. So there was no delay in sending the sample. On reading of the statements of prosecution witnesses, there is no chance or occasion for tampering with the samples.

11. The statement under Section 67 of the Act of appellant Salim was recorded by R.C. Gupta, who was not examined by the prosecution and Shri Bhattacharya (P.W. 3) has stated that he requested Shri Gupta to record the statement of Salim and Salim also gave his consent, but Shri Bhattacharya was not knowing Hindi Language properly. Therefore, in my considered view the statement of Salim (Exh. P-11) cannot be relied upon against him as his extra-judicial confession. Appellant Nasir Hussain and Bhanwar Singh have written their statements (Exhs. P-12 and P-13) in their own handwriting duly signed by them and witnesses. These statements were written by them prior to their arrest and there is no iota of

evidence to say that the statements were obtained under threat, inducement or promise. The statements were given by them voluntarily in which they have confessed hatching of conspiracy with appellant Salim and these statements have been proved properly by Shri Bhattacharya (P.W. 3) as per provision under Section 67 of the Indian Evidence Act and contents whereof are admissible in evidence as per provision under Section 80 of the Indian Evidence Act. Confessional statement of accused recorded as per provision of Section 67 of the Act before the Officers of Narcotic Bureau are admissible in evidence as his confessional statement, because they are not the Police Officers and bar of Section 25 of the Evidence Act would not operate. Supreme Court has considered this aspect in detail, while taking into consideration the earlier judgments on this issue in the case of *Kanhaiyalal v. Union of India* 2008(4) M.P.H.T. 311 (SC) : (2008) 2 SCC (Cri) 474, Paras 40 to 47, and observed in Paras 44 and 45 as under:

44. In addition to the above, in *Raj Kumar Karwal v. Union of India*, this Court held that officers of the Department of Revenue Intelligence who have been vested with powers of an Office-in-Charge of a police station under Section 53 of the NDPS Act, 1985, are not 'Police Officers' within the meaning of Section 25 of the Evidence Act. Therefore, a confessional statement recorded by such officer in the course of investigation of a person accused of an offence under the Act is admissible in evidence against him. It was also held that power conferred on officers under the NDPS Act in relation to arrest, search and seizure were similar to powers vested on officers under the Customs Act. Nothing new has been submitted which can persuade us to take a different view.

45. Considering the provisions of Section 67 of the NDPS Act and the views expressed by this Court in *Raj Kumar Karwal* case with which we agree, that an officer vested with the powers of an Officer-in-Charge of a police station under Section 53 of the above Act is not a 'Police Officer' within the meaning of Section 25 of the Evidence Act, it is clear that a statement made under Section 67 of the NDPS Act is not the same as a statement made under Section 161 of the Code, unless made under threat or coercion. It is this vital difference, which allows a statement made under Section 67 of the NDPS Act to be used as a confession

against the person making it and excludes it from the operation of Sections 24 to 27 of the Evidence Act.

12. In the instant case, the statements (Exhs. P-12 and P-13) of appellants Bhanwarlal and Nasir Hussain were recorded by them in their own handwriting and Shri Bhattacharya (P.W. 3) followed the procedure prescribed under Section 67 of the Act. The appellants were not under arrest. After arrest, they were produced within the stipulated period before the concerned Court where they had not made any statement that their statements were got recorded under pressure and they had not given voluntary statements. They had also not filed any application to this effect before the Court. In these circumstances, their confessional statements are sufficient to establish their guilt. Their statements are corroborated by the evidence of Shri Bhattacharya (P.W. 3) and the circumstantial evidence of meeting of both the appellants at Railway Station with main accused Salim which was the secret information received by the department and officials/witnesses of the department arranged and made a trap.

13. Appellant Nasir Hussain, in answer to question No. 45 of accused statement recorded under Section 313 of the Code of Criminal Procedure, has admitted his signature on his statement (Exh. P-12), but according to him, he had not given any statement. His this answer is contrary to the document (Exh. P-12) which was written and signed by himself. Appellant Bhanwar Singh has also admitted in statement recorded under Section 313 of the Code of Criminal Procedure his signature on his statement (Exh. P-13), but denied giving of any statement and in answer to question No. 47 he expressed his ignorance about his confessional statement (Exh. P-13). In their accused statement, both the appellants have nowhere stated that their statements were obtained by coercive process, threat, promise or inducement, therefore, in the facts and circumstances of the present case, learned Trial Court has rightly relied upon the confessional statements of appellants Bhanwarlal and Nasir Hussain for convicting them.

14. The total defence of the appellants is of false implication. If for the sake of argument, appellants, Bhanwarlal and Nasir Hussain have been falsely implicated, the officials of the department could have shown joint possession of seized heroin

and could have made a case against all the three for the substantive offence under Section 8/21 of the Act and not only under Section 29 of the Act for abatement and criminal conspiracy with appellant Salim. This circumstance is also rendering support to genuineness of entire trap proceedings held by the department of the respondent. It is also pertinent to mention here that information was received in Delhi and from Delhi, they came down to Mandsaur and caught the appellants at Nagda Railway Station.

15. Ex-consequenti, in view of the foregoing discussions, this Court does not find any merit in these appeals. This stage, learned Counsel for the appellants has submitted that the sentence imposed by the Trial Court in default of payment of fine, may reasonably be reduced looking to the period of facing of prosecution by the appellants. Learned Counsel has placed reliance on the Supreme Court judgment passed in the case of Shanti Lal v. State of M.P. 2008(1) M.P.H.T. 1 (SC) : 2008 (1) SCC (Cri) 1. Prayer is accepted. In default of payment of fine, the appellants shall undergo RI for three months on each count. Rest of the conviction and sentences shall remain as it is as passed by the learned Trial Court. Appellants Salim and Nasir Hussain are on bail. They are directed to surrender to their bail bonds before the Trial Court on 30-11-09 and the Trial Court is directed to send them to jail for serving out the remainder part of their sentences. On failure of the appellants to appear and surrender on the specified date, the Trial Court is directed to take suitable legal action against them and their surety/sureties, under intimation to this Court.

16. Let the original judgment be retained in the record of Cri. Appeal No. 891/95 and its copy be placed in the record of Cri. Appeal No. 962/95. A copy of this judgment be also sent to the Trial Court along with its record for compliance.