

The State Vs. Satyanarayan Mallik

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Court : Orissa

Decided On : Nov-18-1964

Reported in : AIR1965Ori136; 1965CriLJ112

Judge : G.K. Misra, J.

Acts : [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 103, 163 and 165;
Bihar and Orissa Excise Act, 1915 - Sections 47 and 55

Appeal No. : Govt. Appl. No. 18 of 1964

Appellant : The State

Respondent : Satyanarayan Mallik

Advocate for Def. : S.B. Patnaik, Adv.

Advocate for Pet/Ap. : Standing Counsel

Disposition : Appeal allowed

Judgement :

G.K. Misra, J.

1. Respondent Satyanarayan Mallik stood charged under Section 47 (a) read with Sections 55 and 47 (b) of the Bihar and Orissa Excise Act. The Excise Sub-Inspector P. W. 3 made a search of his house on 27-7-1963, and recovered 22

hemp plants from his court-yard, and one packet of Ganja from under his cot. The accused himself produced 22 other packets of Ganja. The defence was one of denial of the recovery and production.

2. The trial Court on discussion of the evidence recorded two findings, namely (i) the provisions of Section 165, Cr. P. C. were not complied with and that the search was illegal, and (ii) P. Ws. 1 and 2, the search witnesses, could not identify the hemp plants, and that the recovery and production of the hemp plants are not acceptable. On these findings the accused was acquitted. The State has filed the appeal against the order of acquittal.

3. The learned Standing Counsel contended that the view taken by the trial Court was untenable. Trial Court's view that the provisions of Section 165 Cr. P. C. were not complied with is not correct. Though P. W. 3 stated that he recorded the reasons for his search in writing and forwarded the same to the Magistrate, no such writing has been proved and brought on record. I am, therefore, constrained to hold that P. W. 3 did not comply with the provisions of Section 165, Cr. P. C.

The next question for consideration is whether the learned trial Court's view that the search was without jurisdiction, due to non-compliance of Section 165, Cr. P. C., is correct. To appreciate the contention, Sub-sections (1) and (5) of Section 165 may be quoted :

(1) Whenever an officer in charge of a Police Station or a Police Officer making an investigation has reasonable grounds for believing that anything necessary for the purposes of an investigation into any offence which he is authorised to investigate may be found in any place within the limits of the police station of which he is in charge, or to which he is attached, and that such thing cannot in his opinion be otherwise obtained without undue delay, such officer may, after recording in writing the grounds of his belief and specifying such writing, so far as possible, the thing for which search is to be made, search or cause search to be made, for such thing in any place within the limits of such station.

X X X X 5. Copies of any record made under Sub-section (1) or Sub-section (3) shall forthwith be sent to the nearest Magistrate empowered to take cognizance of

the offence and the owner or occupier of the place searched shall on application be furnished with a copy of the same by the Magistrate.

Mrs. Patnaik placed reliance on *State of Rajasthan v. Rehman*, AIR 1960 SC 210 in support of the contention that the search was illegal. In that case, the question arose in connection with a conviction under Section 353, I. P. C., and as the reasons for the search were not recorded in writing, their Lordships held that the search was illegal. The search being illegal, the respondent was not convicted in obstructing the public servant from making such search. In that case, there was no discussion as to whether the evidence of recovery of the seized articles was inadmissible or not. That case is therefore no authority for the proposition that recovery of articles in course of illegal search is inadmissible in evidence. This question came up for consideration in *Cochan Velayudhan v. State of Kerala*, AIR 1961 Kerala 8 (FB) and their Lordships held that although the failure to comply with the provisions regulating searches may cast doubts upon the bona fides of the officer conducting the search, there is nothing in law which makes the evidence relating to an irregular search inadmissible: and once it is found that the evidence of the recovery of the articles in the search is reliable, a conviction based on such evidence is not invalid on the ground of irregularity in search.

The view taken in the Kerala Full Bench decision is in line with the decision of the Supreme Court in *Radha Kishan v. State of Uttar Pradesh*, AIR 1963 SC 822. Their Lordships clearly pronounced that even if the search was illegal, the seizure of the articles is not vitiated. Where the provisions of Sections 103 and 165 of the Code of Criminal Procedure are contravened, the search can be resisted by the person whose premises are sought to be searched. It may also be that, because of the illegality of the search, the Court may be inclined to examine carefully the evidence regarding seizure. But beyond these two consequences, no other consequence ensues. Even in AIR 1960 SC 210, their Lordships clearly held that a recording of reasons does not confer on the officers jurisdiction to make a search, though it is a necessary condition for making a search. The jurisdiction or power to make a search is conferred by the statute and not derived from the record of reasons. The position of law may therefore be summarised thus. Contravention of Section 165, Cr. P. C. makes the search illegal to the extent that

the person whose house was searched would escape with impunity in case of an obstruction to that illegal search. The illegality of the search, however, does not make the evidence of seizure inadmissible though the Court may be circumspect to closely scrutinise the evidence of seizure. Trial court's view that the search was without jurisdiction and that the evidence of seizure is inadmissible is contrary to Law.

P. Ws. 1 and 2 are the witnesses to the search and seizure. P. W. 2 is the Sarpanch of Gambhari Panchayet and P. W. 1 is a ward member of the village. Their respectability is beyond question. There are no materials on record proving otherwise. Law is well settled that non-compliance with the provisions of Section 103, Cr. P. C. is a mere irregularity (See *Sunder Singh v. State of Uttar Pradesh*, (S) AIR 1956 SC 411). Emphasis is on the word 'respectable' and not on 'inhabitant' of the locality. These two witnesses clearly support the prosecution version that one packet of Ganja was recovered from under cot of the accused and the accused himself gave production of 22 packets. Though P. W. 3 states that the persons of P. Ws. 1 and 2 were searched before they entered into the house, P. Ws. 1 and 2 denied it. This does not, however, affect the legality of the search, but affects the weight to be attached to the evidence of such persons. After closely examining the evidence of P. Ws. 1, 2 and 3, I am satisfied that they are witnesses of truth and two tolas and fourteen annas (33 grams) of Ganja was recovered from the house of the accused.

It is conceded by the learned Standing Counsel that a consumer is entitled to keep in his possession three tolas (35 grams) of duty paid ganja with impunity. In this case, the Ganja recovered was two tolas and fourteen annas which comes within the quantity exempted. The only point for consideration is whether the Ganja recovered is duty paid or non-duty paid. If it is of the latter category, the accused is not entitled to retain any quantity of it. The prosecution evidence on this aspect of the case is wholly unsatisfactory. P. W. 3 does not depose that the Ganja recovered is non-duty paid Ganja, Neither the Ganja was sent for chemical examination. In the seizure list, all that is mentioned is that 22 packets of Deshi (country) Ganja were recovered. This by itself does not establish that the Ganja was non-duty paid Ganja. The position thus is that there is no prosecution

evidence that non-duty paid Ganja was recovered from the possession, of accused. Though the learned Magistrate was not alive to this aspect of the case, the charge under Section 47 (a) read with Section 55 of the Bihar and Orissa Excise Act must fail on this ground.

4. The next question for consideration is whether the hemp plants were seized from the court-yard of the accused. P. Ws. 1 and 2 are not in a position to identify the plants. Their evidence is that the plants recovered from the court-yard of the accused looked like Makhmal Fool plants. Much reliance cannot therefore be placed on their evidence. P. W. 3 is well acquainted with Ganja plants. His categorical statement is that the plants were hemp plants. No effective cross-examination has been made to demolish this evidence. On his evidence alone I am satisfied that the plants recovered were hemp plants.

5. Under Section 13(b) of the Bihar and Orissa Excise Act, no hemp plant shall be cultivated except under the authority and subject to the terms and conditions of the license granted in that behalf by the Collector. The accused does not make out a case that he has a licence. On the contrary, his defence is that he did not grow such plants. On the finding that he cultivated the hemp without licence in his courtyard, he is liable to be convicted under Section 47 (b) of the Bihar and Orissa Excise Act.

6. Despite vigilance on the part of the Government, the habit of surreptitiously growing hemp has not come to an end. Cases of such type must be met with deterrent punishment. The reasons given by the learned Magistrate were contrary to law. He was not alive to the essential questions involved in the case. On a thoroughly superficial examination he directed order of acquittal of the respondent.

7. In the result the judgment of the trial Court is set aside and the appeal is allowed. The respondent is convicted under Section 47(b) of the Bihar and Orissa Excise Act and sentenced to undergo rigorous imprisonment for two months.