

Balaji Sahu Vs. State

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SooperKanoon Citation : sooperkanoon.com/530438

Court : Orissa

Decided On : Sep-24-1996

Reported in : 84(1997)CLT357; 1997CriLJ2843; 1997(I)OLR71

Judge : Dipak Misra, J.

Acts : Narcotics Drugs and Psychotropic Substances Act, 1985 - Sections 50

Appeal No. : Jail Criminal Appeal No. 169 of 1994

Appellant : Balaji Sahu

Respondent : State

Advocate for Def. : Sangram Das, Addl. Standing Counsel

Advocate for Pet/Ap. : Sujata Das, Adv.

Disposition : Appeal allowed

Judgement :

Dipak Misra, J.

1. Gone are the days of yore when an Emperor like Babar, at the cost of his life prayed for an ailing son ; vanished are the days of old when an obedient son like Rama chose his way to the forest sacrificing the royal throne and disappeared is the era when a casabianca stood imbedded on the burning dock in honour of his

father's command. Here is an unfortunate case where the father and the brother, succumbing to their inferior endowments from nature, arrived at the police station and lodged a written report (Ext. 2) complaining about the drug addiction as well as the clandestine drug business of the appellant. In promptitude a station diary entry was made to that effect and information was sent to the Town Inspector. Raiding party inclusive of independent witnesses went to the houses of the Informant where the appellant resided and recovered from him custody three small packets containing 1350 ml. grams of heroin and another small packet containing 1150 ml. grams 'Ganja' from his pant pocket along with a 'Chilliam' and some cash. The AS I (PW 6, got the heroin and Ganja packets weighed by a goldsmith and sealed the same in presence of witnesses and prepared a seizure list. The accused along with the seized articles were brought to the police station. The ASI handed over the case to another Sub-Inspector. Subsequently; the Officer-in-charge of the concerned police station (PW 8. took charge of the case as per the direction of the Additional Superintendent of Police, Puri. The seized packets were sent for chemical examination and on completion of other formalities charge-sheet was submitted against the accused.

2. The accused took the plea of complete denial and false implication due to family quarrel.

3. To bring home the charges, the prosecution examinee eight witnesses in all and certain documents, namely the seizure list First Information Report, Chemical Report, forwarding report and others were brought on record. PW 1 is an independent witness to the seizure ; PW 2 is the goldsmith who weighed the articles on-spot; PW 3 is the father; PW 4 is the brother of the accused; PW 5, the ASI of Police, was a member of the raiding party ; PW 6 is the Sub-Inspector of Police of Kumbharapara Police Station ; PW 7 is the Town Inspector; and PW 8 is the Officer-in-charge who subsequently took charge of the investigation and submitted the charge-sheet under Section 20(b) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (in short,'the Act').

4. On analysis of the materials on record and repelling the submissions of the accused with regard to non-compliance of mandatory provisions enjoined under

Sections. 42(2) and 50(1) of the Act and absence of proof in regard to the safe custody of the articles, the learned trial Judge found the accused guilty of the alleged offences and accordingly sentenced him to undergo R. I. for period of ten years and to pay a fine of Rs. 1,00,000/- (Rupees one lakh), in default to undergo further R.I. for two years.

5. Miss. Sujata Das, the learned counsel for the appellant has contended that the learned trial Judge has completely erred in holding that there has been compliance of Section 50 and Section 42(2) of the Act. She has strenuously urged that the learned trial Judge has deal with the aspect of safe custody of the articles in an extremely cryptic manner though there is no acceptable evidence that the seized articles were kept in safe custody. Her further submission is that the seized articles are to be kept in the custody of the Officer-in-charge of police station as provided under Section 55 of the Act, but the same has not been done which makes the prosecution version unbelievable. She has also proponed that as the prosecution has not been able to adequately explain with regard to the delay in sending the seized articles for chemical examination as well as the safe custody of the same during the interregnum period, the appellant is entitled to an order of acquittal.

6. Mr. Sangram Das, the learned Additional Standing Counsel refuting the submissions of Miss. Das has contended that there is ample evidence on record indicating due compliance of the mandatory provisions. His submission in relation to safe custody of the seized articles is that the prosecution has brought on record acceptable materials to establish proper custody, and the acceptance thereof by the learned trial Judge cannot be faulted. It is his further submission that the delay in sending the seized articles for chemical examination cannot be fatal to the prosecution case in the facts and circumstances of the present case.

7. Let me first deal with the contention of Miss. Das with regard to the non-compliance of Section 50 of the Act. PW 6, the ASI of Police, who conducted the search and seizure in paragraph 3 of his Examination-in-chief, has deposed that he had asked the accused whether he wanted to be searched by him or in presence of a Magistrate and as the accused agreed to be searched by him, he conducted the search in presence of the Town Inspector. The Town Inspector, PW

7, has stated that the accused was asked whether he wanted to be searched in presence of him (the Town Inspector) as he was a Gazetted Officer. He has admitted in his cross-examination that he was one of the members of the raiding party. The search and seizure has to be conducted in absolute compliance with the provisions of Section 50 of the Act. PW 6, the ASI, has not stated that he apprised' the accused with regard to his right. He has not stated that he made the accused aware of his right to be searched either in presence of a Gazetted Officer or an Executive Magistrate. On close scrutiny of the evidence of this witness it is clearly perceptible that he has not informed the accused that the Town Inspector who had accompanied him was a Gazetted Officer and he had the right to be searched in presence of a Gazetted Officer. PW 7 has stated that the accused was asked whether he would be searched in presence of the Town Inspector and he agreed to be searched in his presence. The evidence of PW 6 and PW 7 make it absolutely clear that the accused was made aware of his right. In this context I may refer to the decision of the apex Court in the case of Saiyad Mohd alias Saiyad Umar Saiyad v. State of Gujarat, reported in (1965) 3 Supreme Court Cases 810, wherein it has been held as follows :

"Having regard to the object for which the provisions of Section 50 have been introduced into the NDPS Act and when the language thereof obliges the officer concerned to inform the person to be searched of his right to be searched in the presence of a Gazetted Officer or Magistrate, there is no room for drawing a presumption under Section 114, Illustration (e) of the Indian Evidence Act, 1872. By reason of Section 114 a Court 'may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to facts of the particular case'. It may presume '(e) that judicial and official facts have been regularly performed.' There is no room for such presumption because the possession of illicit articles under the NDPS Act has to be satisfactorily established before the Court. The fact of seizure thereof after a search has to be proved, When evidence of the search is given all that transpired in its connection must be stated. Very relevant in this behalf is the testimony of the officer conducting the search that he had informed the person to be searched that he was entitled to demand that the search be carried out in the presence of a Gazetted Officer or a

Magistrate and that the person had not chosen to so demand. If no evidence to this effect is given the Court must assume that the person to be searched was not informed of the protection the law gave him and must find that the possession of illicit Articles under the NDPS Act was not established.'

That apart, the Town Inspector has himself admitted that he was a member of the raiding party. This Court in the case of Radha Krishna Singhani and Anr. v. State of Orissa, reported in 79(1 995) CLT 904 has held that the search conducted in presence of a Gazetted Officer or a Magistrate who is a member of the raiding party is riot in conformity with the mandatory provision of Section 50 of the Act. I am not going to address myself whether the search conducted in presence of a Gazetted Officer or an Executive Magistrate who is a member of the raiding party would be in consonance with the mandatory provisions of Section 50 of the Act or not. Suffice it to say, in the present case, I am not accepting the version of the prosecution that the accused was made aware of his right of being searched in presence of a Gazetted Officer or an Executive Magistrate, and further there is no material that he was also apprised of the position that the Town Inspector was a Gazetted Officer. The Searching Officer, PW 6 and the Town Inspector have given different versions. Thus I am of the considered view that there has been non-compliance of Section 50 of the Act.

8. Let me now deal with the submission in regard to the safe custody of the seized articles. It is canvassed by the learned counsel for the appellant that the articles which were seized from the custody of the accused were not the same what had been sent for chemical examination. PW 6 in his evidence has stated that he brought the seized packets to the police station and handed, over the same to one Sub-Inspector as the Officer-in-charge was absent. As per his version he kept the seized articles in the Malkhana of the police station. The officer-in-charge has been examined as PW 8. He has deposed that before producing the articles in Court, he had kept the same in the police station Malkhana and he was in-charge of the same. Initially this witness had not produced the Malkhana register but later on he produced the same on 15-1-1994 and the relevant entry in the said register has been marked as Ext. 13. In the cross-examination the said witness had admitted that the word 'sealed' has been written subsequently. The witness has

tried to explain that he wrote the word 'sealed' after he reached the police station. He has admitted that he has not put his signature or initial to show that the same was written by him. Sealing is a very significant aspect of safe custody. In absence of adequate proof of sealing a grave doubt arises whether the seized articles were kept in proper safe custody. The doubt gets further aggravated as the seized articles were produced after expiry of 43 days. True it is, the delay on this score would not vitiate the trial but when the question of safe custody is taken into consideration, the onus is in the prosecution to satisfy the Court that all effective steps were taken for safe custody and in fact the seized articles were in safe custody. Coupled with unacceptable evidence on record, the unexplained delay becomes a factor to arrive at an irresistible conclusion that the seized articles were not in safe custody. In the case of Valsala v. State of Kerala, reported in AIR 1994 SC 117, the apex Court has held as follows:

'Suffice it to say that the articles seized appears to have been not kept in proper custody and proper form, so that the Court can be sure that what was seized only was sent to the chemical examination. There is a gap and important missing link.'

The apex Court has given emphasis on proper custody as well as form. As I have already expressed my doubt with regard to the 'sealed' part of it a grave doubt arises in respect of the proper form. The submission of Miss. Das is also acceptable on this point.

10. Let me now deal with the non-compliance of Section 42(2) of the Act. Submission of the learned counsel is that the oral information given by the brother has not been recorded as required under the said provision. I find from the evidence of PW 5, the A. S. I. of Police attached to the concerned police station that the information given by the brother was noted in the station diary vide Ext. 15. Of course, there is admission by this witness that the telephonic talk with the Sub-Inspector and the Town Inspector has not been reflected in the station diary. This aspect loses its significance as the Town Inspector had gone along with the A. S. I. This submission of Miss. Das is without any force and is accordingly rejected.

11. As I have accepted the submission of the learned counsel for the appellant in regard to compliance of the mandatory provision as envisaged under Section 50(1) of the Act as well as her submission relating to the safe custody of the seized articles, I am of the considered view that the judgment passed by the learned First Additional Sessions Judge, Puri is vulnerable and accordingly the same is set aside. The appellant be set at liberty forthwith if his detention is not required in any other case.

12. Before I part with this appeal, I am constrained to observe that due to non-compliance of mandatory provisions the appellant has been entitled to an order of acquittal.' But a grave situation has emerged in the present case. The dangerous and devastating effect of the drug addiction has compelled the father and the brother to set the criminal action in motion. May be it was extremely intolerable for them. May be they were not in a position to control him. But they could have taken him to a de-addiction centre. Parents have a positive role in these matters and they have to shoulder the responsibility. People at large should not stand as silent spectators leaving the total responsibility to the Police Administration. Concern and caution have to be manifestly demonstrated in the domestic sphere before home becomes hell. The individual has to light the torch so that eventually it can be transformed to a universal laser.