

Jogindra Singh Vs. State of Orissa

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Court : Orissa

Decided On : Feb-20-2001

Reported in : 92(2001)CLT655; 2001CriLJ2401; 2001(I)OLR404

Judge : P.K. Patra, J.

Acts : [Narcotic Drugs and Psychotropic Substances Act, 1985](#) - Sections 20, 50, 52, 55 and 57

Appeal No. : Criminal Appeal No. 224 of 1998

Appellant : Jogindra Singh

Respondent : State of Orissa

Advocate for Def. : Addl. Standing Counsel

Advocate for Pet/Ap. : D. Panda, Adv.

Disposition : Appeal allowed

Judgement :

P.K. Patra, J.

1. The appellant has challenged the judgment dated 1-9-98 passed by Shri U.S. Mishra, Sessions Judge, Sambalpur in Sessions Trial No. 112 of 1997, convicting him under section 20(b)(i) of the [Narcotic Drugs and Psychotropic Substances Act,](#)

[1985](#) (hereinafter referred to as 'the Act') and sentencing him to undergo rigorous imprisonment for five years and to pay a fine of Rs. 50,000/-, in default, to undergo rigorous imprisonment for a further period of one year.

2. Briefly stated, the prosecution case runs as follows :

On 5-4-1997 at about 11.10 a. m. the Officer-in-charge of Jharsuguda Police Station (p. w. 3) received reliable information that a person of Bihar was carrying Ganja in an attache having contacted local shop-keepers for disposal of the same. The said information was entered in the Station Diary Entry No. 114 dated 5-4-97 (Ext. 4). P, w. 3 intimated the said fact to the Superintendent of Police, Jharsuguda in writing vide Ext. 5, besides entering the same in the S. D. E. No. 115 dated 5-4-97 (Ext. 4/1). Thereafter p. w. 3 sent requisition to the sub-divisional Magistrate, Jharsuguda to depute an Executive Magistrate and accordingly the S. D. O.-cum-Executive Magistrate, Jharsuguda (p. w. 1) arrived at the P. S., Thereafter p, w. 3, accompanied by p. w. 1 and a constable (p. w. 2) and an S. I. of the P. S. (p. w. 4) left for S. B. I. Chhach, Jharsuguda and waited there. At about 1.00 p. m., the appellant (hereinafter referred to as 'the accused') was found coming towards the Bus Stand with an attache in hand and was detained by p. w. 3 who disclosed his identity and the purpose of detaining him. When the accused did not exercise his option to be searched before an Executive Magistrate, p. w. 3, after disclosing the identity of p. w. 1 as an Executive Magistrate, searched the accused. Nothing incriminating was found from the person of the accused, but on search of the attache (M. O. III), a packet of Ganja was found in it along with the wearing apparels of the accused. Since the accused could not produce any authority to carry the contraband Ganja, the same was seized after weighment and drawing up of two samples each weighing 24 grams. The balance quantity of Ganja, out of 3 kgs. 50 grams, was kept in a packet and that packet and the two sample packets were sealed by using brass seal (M. O. II) of p. w. 3 in presence of witnesses. The brass seal (M. O. II) was kept in zima of p. w. 1. After arresting the accused, p. w. 3 drew up a plain paper F. I. R. (Ext. 7) and directed p. w. 4 to take up investigation. The accused was taken to the P. S. along with seized articles and on the next day he was produced in court in custody with request to the S. D. J. M., Jharsuguda to forward the same packets for chemical examination. Since it was

not possible to forward the sample for chemical examination on the same day, it was returned back to the Investigating Officer for production on the next day and on the next day, the same was forwarded for chemical examination. The report of the chemical examination (Ext. 11) revealed that the sample consisted flowering and fruiting top of Cannabis Sativa (Ganja). After completion of investigation, p. w. 4 submitted charge-sheet against the accused, who stood his trial.

3. The defence plea is one of denial and false implication.

4. Mr. D. Panda, learned counsel for the accused and learned Additional Standing Counsel for the State were heard at length. While Shri Panda contended that the impugned judgment is unsustainable in law and is liable to be set aside, the learned Additional Standing Counsel supported the impugned judgment.

5. In order to bring home the charge against the accused, prosecution has examined four, witnesses; of whom p. w. 3 is the Officer-in-charge of the P. S. who detected this case. P. w. 1 is the Executive Magistrate, p. w. 2 is a constable of the P. S. who had accompanied p. w. 3 to the spot and p. w. 4 is the Investigating Officer who has placed charge-sheet u/s. 20(b)(i) of the Act against the accused. Defence has examined none.

6. The learned Sessions Judge placed reliance on the statements of the four official witnesses and rejected the defence contention that non-examination of independent witnesses and non-compliance of the mandatory provisions of the Act, vitiated the trial.

7. In the present case, it is to be considered whether trial was vitiated due to non-compliance of the mandatory provisions of the Act, keeping in view the decision of the Apex Court:., Thandi Ram v. State of Haryana reported in J. T. 1999 (3) S. C. 231, wherein referring to the decisions in the case of Mohinder Kumar v. State, Panaji, Goa reported in A. I. R. 1995, S. C. 1157 and the case re : State of Punjab v. Balbir Singh J. T. 1994 (2) S. C. 108, it has been held that for non-compliance of provisions of sections 50, 52, 55 & 57 of the Act, the conviction of the accused cannot be sustained and he will be entitled to an acquittal.

8. P. w. 3 has stated that after detaining the accused and disclosing his identity and purpose of his search, asked him as to whether he wanted to be produced before any ExecutiveMagistrate and the accused did not insist for the same and thatstill then the identity of the Executive Magistrate (p. w. 1) was disclosed to the accused. He has further stated that after the accused gave his consent for search, the search was conducted. P. w. 3 has not specifically stated that the accused was informed about his right to be searched in presence of a Magistrate or a Gazetted Officer and was asked to exercise his option. In his statement in cross-examination, p. w. 3 has stated that no written notice Was given to the accused to avail the benefit of section 50 of the Act. The I.O. (p. w. 4) has stated that they waited at the spot till 1.00 p, m. when the accused arrived there with the attache in his hand and that at 3.00 p.m. p. w. 3 searched the person 6f the accused in presence of witnesses after observing the formalities of search. He is completely silent regarding the option given to the accused to be searched in presence of a Gazetted Officer or a Magistrate. The Magistrate (p. w. 1) has also not stated that the accused was given the option to be searched in presence of a Magistrate or a Gazetted Officer; but has stated that when the accused fumbled and hesitated, hearing p. w. Staying that he wanted to search the attache, he (p.w. 1) disclosed his identity to the accused and told him that p.w. 3 wanted to search his attache and thereafter p.w. 3 searched the attache of the accused. In his statement in cross-examination p. w. 1 has gone to the extent of stating that to his query the accused disclosed that he was regularly selling Ganja and gave his address which p. ws. 3 & 4 have not stated. P. w. 1 has stated that he was not examined by the I.O. in this case and that the owner of Sambalpur Bastralaya was present in the shop at the time of search and seizure which is not supported by the I.O. (p. w. 4). The interestedness of p. w. 1 is manifest from his statement, P. w. 2 has stated that while p. w; 3 told the accused that the Executive Magistrate was also present at the spot, the accused gave his consent to be searched. P. w. 3 has stated that it was a crouded place of Jharsuguda town but no employee of Sambalpuri Bastralaya or any shop-keeper of the locality has been cited as witness in this case, P. w. 4 has stated that the seizure was effected in front of Sambalpuri Bastralaya atJharsuguda when the shop was open and employees of the shop were present but none of them has been cited as a witness in this case. According

to p. ws. 1 to 4, the accused was detained at the spot at 1.00 p.m. but the search was conducted at 3.00 p.m. and the seizure list (Ext. 1) also reveals that the search was conducted at 3.00 p.m. . But the plain paper F.I.R. (Ext. 7) has been drawn up at 5.00 p.m. and the case has been registered at 5.45 p.m. . It is not known what they were doing during, this long period and the reason for such delay has not been explained. Thus it is found that there is no evidence on record that the accused was given notice orally or in writing, to exercise his option to be searched in presence of a Magistrate or a Gazetted Officer, as contemplated u/s. 50 of the Act.

9. In the case of *State of Punjab v. Labh Singh and others* reported in 1996 C. A. R. 378, the Apex Court held as follows

'In view of the settled legal position that the accused has valuable right to be informed of his right to be searched in the presence of a Gazetted Officer, the Search Officer invariably would conduct the search subserving the salutary right given under section 50. Each case should be considered in the light of the facts and circumstances in which the contraband was seized, viz., time when the search was conducted, the place where it was seized, whether police had prior information of the contraband being in transport or place of concealment, whether there was proper opportunity to the police to secure the presence of a Gazetted Officer; whether the delay in search and seizure would result in the escape of the accused from arrest or contraband would be destroyed or whisked away and host of all relevant attendant circumstances. Each case depends upon its own factual scenario and no exhaustive or mathematical formula of universal application can be laid down. The Court has to consider each case on its own setting. In view of the absence of any writing from the accused to the effect that the accused was informed of his right and that the same was waived taken by the officer who conducted the search and seized the contraband and in view of the long delay that has taken place, we think that these may not be cases warranting interference with the order of acquittal at this distance of time.'

In the case of *Mr. Suresh Kumar Sahu v. State of Orissa* reported in (1996) 11 O. C. R. 487, it has been held that when none of the witnesses including the detecting

officer stated that option had been given to the accused to be searched either before a nearest Gazetted Officer or before the nearest Magistrate, it is to be held that the mandatory requirement of section 50 of the Act has not been complied with and as such it must be held that the trial was vitiated.

In the case re : Bijaya Kumar Sabudhi reported in (1995) 8 O. C. R. 315, referring to two decisions in the cases Mr. B. Bamannamma reported in IV (1993) O. C. R. 3095 and Babu Rao v. State of Karnataka reported in 1993 Cri. L. J. 2310, it has been held that predicating an option for an accused to be searched either before a Magistrate or a Gazetted Officer, the legislative intent is apparent that it wanted to safeguard the liberty of an accused against false criminal charge and that it would be improper on the part of the arresting authority to get the accused searched in presence of any member of the raiding party even if he happens to be a Gazetted Officer.

In the present case, p. w. 1 was definitely a member of the raiding party.

In the case re Sardar Singh v. State of Rajasthan reported in All India Prevention of Food Adulteration Journal Part-I, 1997 at page 76, when appellant was given one option to be searched in presence of a Gazetted Officer, it has been held that there was non-compliance of the mandatory provisions under section 50 of the Act and fatal for the prosecution, case and conviction was found to be unsustainable in law.

In the case of Mr. Shyam Sundar Soni v. State reported in 1996 (1) Crimes 387, the Delhi High Court held that giving of notice under section 50 of the N. D. P. S. Act is a mandatory requirement of law.

In the case Pankaj Pradhan v. State reported in 1998 (1) O. L. R. 91, this Court held that the search and seizure in presence of the Circle Inspector of Police who is a Gazetted Officer, are against mandatory provisions of the Act and hence illegal.

10. The learned Sessions Judge has failed to appreciate the evidence on record in its correct perspective and has reached the erroneous conclusion that the

prosecution has been able to establish that the mandatory provisions of section 50 have been complied with, which is unsustainable and is liable to be set aside.

Keeping in view the evidence on record as discussed earlier and the principles enunciated in the decisions referred to above, the irresistible conclusion will be that the prosecution has not been able to establish that the mandatory provisions of section 50 of the Act have been complied with and as such the trial is vitiated. The conviction of the appellant cannot be sustained and he will be entitled to an acquittal. The impugned judgment being unsustainable in law, is liable to be set aside. In view of the above finding, a discussion regarding compliance or non-compliance of the mandatory provisions of the Act will be merely academical.

11. In the result, the Criminal Appeal is allowed and the impugned judgment dated 1-9-98 passed by the Sessions Judge, Sambalpur in Sessions Trial No. 112 of 1997 convicting the appellant under section 20(b)(i) of the Act and sentencing him to undergo rigorous imprisonment for five years and to pay fine of Rs. 50,000/-, in default, to undergo rigorous imprisonment for a further period of one year, is set aside. The appellant is found not guilty and is acquitted of the charge. He be set at liberty forthwith, if his detention is not required in any other case.

12. Appeal allowed.