

Pilli Dilli Dora Vs. State of Orissa

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Court : Orissa

Decided On : Jul-15-1994

Reported in : 1995(1)ALT(Cri)14; 78(1994)CLT734; 1995CriLJ1758

Judge : R.K. Patra, J.

Acts : Narcotic Drugs and Psychotropic Substances Act, 1986 - Sections 2, 8, 20 and 41 to 68; [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 4, 100, 165 and 293; Bihar and Orissa Excise Act, 1915 - Sections 74; [Narcotic Drugs and Psychotropic Substances Act, 1985](#) - Sections 8

Appeal No. : Crl. A. No. 137 of 1980

Appellant : Pilli Dilli Dora

Respondent : State of Orissa

Advocate for Def. : Debashis Das, Addl. Govt. Adv.

Advocate for Pet/Ap. : S. Das, ;T.K. Das, ;A.K. Nayak, ;B.N. Udgata and ;A.K. Choudhury, Advs.

Disposition : Appeal allowed

Judgement :

R.K. Patra, J.

1. The appellant has been convicted under Section 20(b)(i) of the [Narcotic Drugs and Psychotropic Substances Act, 1985](#) (hereinafter referred to as 'the Act') for being in unlawful possession of 8 K.gs. of ganja without any authority in contravention of Section 8 of the Act. He has been sentenced to undergo rigorous imprisonment for three years and also to pay a fine of Rs. 6,000/- with a defaulting sentence.

2. Briefly stated, the prosecution case is that on 12-1-1990 at about 11-30 a.m. the Sub-Inspector of Excise, E.I.S., Berhampur (P.W. 3) when was on patrolling duty along with his staff including the Excise Constable (P.W. 1) at Goilundi bus stand, Berhampur, found the appellant to be searching for a Puri-bound bus. The appellant had a tin box with him. On suspicion P.W. 3 detained the appellant and after disclosing his identity, search of the tin box held by the appellant was conducted in presence of the witnesses. P.W. 3 found one jari bag inside the tin box which was filled with non-duty paid ganja. On weighment, the contents were found to be of 8 kgs. P.W. 3 seized the tin box and the ganja and prepared the seizure list. After, making necessary investigation, prosecution report was submitted against the appellant which has ended in his conviction as aforesaid.

3. The plea of the appellant was one of complete denial.

4. In order to prove its case, prosecution examined three witnesses on its behalf. P.W. 3 is the Sub-Inspector of Excise who conducted the search and seizure, P.W. 1 is the excise constable and was a witness to the search and seizure. P.W. 2 is a seizure witness but he did not support the prosecuting case.

5. The first question that arises for consideration is whether the appellant was found in possession of 8 k.gs. of non-duty paid ganja as alleged by the prosecution. P.W. 3 testified that on the date of occurrence at about 11-30 a.m. while he along with his staff was performing patrolling duty Goilundi bus stand, Berhampur, he found that the appellant was, searching for a Puri-bound bus at the western end of the platform. On suspicion, he detained the appellant and after disclosing his identify, searched the contents of the tin box which was being held by the appellant. P.W. 3 stated that from the box he found one jari bag which was filled with agency variety of ganja. On weighment the contents were found to be of

8 k.gs. The ganja was in powder form. He examined the contents by burning and also took smell of the same. He deposed that basing on his six years' experience in the department and special training undergone by him for identification of ganja, he was of the opinion that the contents of the bag was agency ganja, i.e., flowering and fruiting top of cannabis plants mixed with leaves and seeds. The appellant could not produce any authority in support of his possession of the ganja on demand. Accordingly P.W. 3 seized the ganja and prepared the seizure list Ext. 1. A copy of the seizure list was furnished to the appellant then and there who received the same and acknowledged the same on the reverse of the seizure list vide Ext. 1/2. P.W. 1, the excise constable, in his evidence has fully corroborated P.W. 3 with regard to the search and seizure of 8 kgs. of ganja from the possession of the appellant. No doubt the independent seizure witness P.W. 2 denied his knowledge about the seizure. He, however, did not dispute his signature on Ext. 1/4 in the seizure list but he explained by saying that he put his signature on a blank paper. The said witness is an auto rickshaw driver. It is not believable that he would put his signature on a blank paper furnished by the excise people without knowing the implication of signing in such manner. The witness has 'clearly been gained over by the defence. No doubt P. Ws. 3 and 4 are official witnesses and on close and thorough reading of the evidence of those witnesses, I do not find anything on record to discredit their testimony with regard to search and seizure of 8 kgs. of ganja from the possession of the appellant. I find their evidence to be reliable, cogent and trustworthy. 6. Learned counsel for the appellant relying on the judgment of the Supreme Court in the State of Punjab v. Balbir Singh, 1994 (1) Crimes 753 :(1994 Cri LJ 3702) contended that the provisions of Section 50 of the Act are mandatory and they have not been complied with in the instant case on account of which trial got vitiated. Section 50 of the Act provides that when the empowered officer is about to search a person under the provisions of Section 41 to 43 of the Act, he shall, if the person to be searched so requires, take him without any unnecessary delay to the nearest gazetted officer of any of the departments mentioned in Section 42 or to the nearest Magistrate. Their Lordships in Balbir Singh (1994 Cri LJ 3702) (supra) indicated the stage where Section 50 of the Act would come into play. After referring to Section 4 of the Code of Criminal Procedure, 1973 which states that

the provisions of the Cr. P.C. are applicable where an offence under the Indian Penal Code or under any other law is being enquired into, tried and otherwise dealt with, their Lordships observed as follows (at p. 3709):

'.....From the words 'otherwise dealt with' it does not necessarily mean something which is not included in the investigation, inquiry or trial and the word 'otherwise' points to the fact that the expression 'dealt with' is all comprehensive and that investigation, inquiry and trial are some of the aspects dealing with the offence. Consequently the provisions of the Cr. P.C. shall be applicable in so far as they are not inconsistent with the N.D.P.S. Act to all warrants, search seizures and arrests made under the Act. But when a police officer carrying on the investigation including search, seizure or arrest empowered under the provisions of the Cr. P.C. 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 N.D.P.S. Act also then he must follow thereafter the provisions of the N.D.P.S. Act and continue the investigation as provided thereunder. If on the other hand, he is not empowered then the obvious thing he should do is that he must inform the empowered officer under the N.D.P.S. Act who should thereafter proceed from that stage in accordance with the provisions of the N.D.P.S. Act. But at this stage the question of resorting to Section 50 and informing the accused person that if he so wants, he would be taken to a gazetted officer and taking to gazetted officer thus would not arise because by then search would have been over. As laid down in Section 50 the steps contemplated thereunder namely informing and taking him to the gazetted officer should be done before the search. When the search is already over in the usual course of investigation under the provisions of Cr.P.C. then the question of complying with Section 50 would not arise.'

In para 8 of the judgment, the Court further observed (at p. 3711) :

'.....It thus emerges that when the police while acting under the provisions of Cr. P.C. as empowered therein and while exercising surveillance or investigating into other offences, had to carry out the arrests or searches they would be acting under the provisions of Cr. P.C. At this stage if there is any non-compliance of the

provisions of Section 100 or 165, Cr. P.C. that by itself cannot be a ground to reject the prosecution case outright. The effect of such non-compliance will have a bearing on the appreciation of evidence of the official witness and other material depending upon the facts and circumstances of each case. In carrying out such searches if they come across any substance covered by the N.D.P.S. Act the question of complying with the provisions of the said Act including Section 50 at that stage would not arise. When the contraband seized during such arrests or searches attracts the provisions of the N.D.P.S. Act then from that stage the remaining relevant provisions of N.D.P.S. Act would be attracted and the further steps have to be taken in accordance with the provisions of the said Act.'

7. In the case at hand, there is no evidence that P.W. 3 had any prior information leading to a reasonable belief that an offence under Chapter IV of the Act was committed. As revealed from his evidence, he was on routine patrolling duty and on suspicion he searched the box held by the appellant from which the ganja in question was recovered. From this evidence, it is evident that the search was already over in the ordinary course of investigation under the Cr. P.C. and there was no scope for P.W. 3 to take steps as contemplated under Section 50 of the Act, namely, informing and taking the appellant to the gazetted officer before search was conducted. In any event, P.W. 3 has clearly and categorically stated that before he wanted to search the box in presence of P.W. 1 and P.W. 2, he asked the appellant whether he wanted to be searched in presence of a gazetted officer of his department or in presence of any Magistrate, but the appellant declined to go. P.W. 1 has also stated that when the Sub-Inspector of Excise (P.W. 3) wanted the appellant whether he wished to go to a gazetted officer or a Magistrate for search, he refused to go saying that he was to go to Puri. This evidence indicates that P.W. 3 has complied with the requirements as contemplated under Section 50 of the Act. Learned counsel submitted that in absence of any mention of compliance of the provision of Section 50 of the Act in the seizure list and the forwarding report, the bare oral evidence of P.W. 3 should not be accepted. On the facts and circumstance of the case, I do not find any merit in this submission. Seizure list is prepared in evidence of the article seized in course of the enquiry or investigation. There is no need to mention about compliance of Section 50 of the Act in the seizure list. In the forwarding report

submitted to the Court, P.W. 3 could have mentioned that he had complied with the provision of Section 50 of the Act. Such mention in the forwarding report could have been taken as a corroborative piece of evidence to the statement made by P.W. 3 in court. Since I have already held P.W. 3 to be a reliable and trustworthy witness, non-mention of compliance of Section 50 of the Act in the forwarding report cannot jettison his evidence.

8. Learned counsel next submitted that P.W. 3 had not complied with Section 42 of the Act as he had not taken down the information in writing nor recorded the grounds of his belief that an offence under Chapter IV of the Act had committed. For this, according to the counsel the conviction of the appellant is not sustainable. Chapter V, of the Act, contains provisions from Section 41 to 68 dealing with the power to arrest, issue warrant, carrying out seizure etc. and the procedure to be followed, these provisions operate if any of the steps mentioned therein are to be taken when there is reason to believe that any person who is sought to be arrested and searched has committed an offence punishable under Chapter IV of the Act. As already noted, in the instant case, P.W. 3 was on routine patrolling duty and in course of it, he detained the appellant on suspicion and after conducting the search, the ganja in question was recovered from him. This being the position, non-compliance of Section 42 of the Act by P.W. 3 does not ipso facto affect the conviction of the appellant unless it is shown that such non-compliance has caused prejudice to him and resulted in failure of justice. The effect of such failure has to be kept in view in appreciating the evidence (vide paras 10, 20 and 21 of the judgment in Balbir Singh's case (1994 Cri LJ 3702) (supra). A Bench of this Court in Nilamber Sahu v. State of Orissa, (1990) 69 Cut LT 718 (DB) held that non-compliance of Section 74 of the Bihar and Orissa Excise Act, 1915 which requires the Excise Officer to record the grounds of his belief before search is undertaken, ipso facto would not vitiate the trial unless it is shown that such non-compliance has brought about miscarriage of justice. For the aforesaid reasons, I do not find any merit in this contention which is accordingly rejected.

9. Learned counsel also submitted that in absence of chemical test of the seized article, it cannot be held that it was ganja. In this connection, he placed reliance on decisions of this Court in State v. Satyanarayan, (1965) 31 Cut LT F72 : (1965(2) Cri

LJ 112), Radheshyam v. State, (1984) 58 Cut LT 388 and State of Orissa v. Lokanath Sahu, 1986 (1) Orissa LR 576. P.W. 3 in his evidence stated that the seized article was in powder form and after examining the same by burning and smelling, he could know that it was ganja. He also claimed that he had six years of experience in the department and had undergone special training in identification of ganja. The question that arises for consideration is whether in absence of any chemical examination, merely on the basis of the oral statement, the seized article can be held to be ganja. Section 2(iii) defines cannabis (hemp) to mean :

(a) charas.....

(b) 'ganja', that is, the flowering or fruiting tops of the cannabis plant (excluding the seeds and leaves when not accompanied by the tops), by whatever name they may be known or designated; and

(c) any mixture, with or without any natural material, of any of the above forms of cannabis or any drink prepared therefrom.'

In order to determine the aforesaid point, it is necessary to refer to the relevant standing instructions/ orders issued from time to time by the Narcotics Control Bureau, New Delhi. The Government of India, Ministry of Finance (Department of Revenue) in notification No. 12/89-Opium dated 30th May, 1989 has specified 13th December, 1989 as the date of prohibition against production, possession, use etc. of ganja for any purpose other than medical and scientific purpose. It reads as follows:

'S.O. 390(E). In exercise of the powers conferred by the first proviso to Section 8 of the [Narcotic Drugs and Psychotropic Substances Act, 1985](#) (61 of 1985), the Central Government hereby specifies the 13th December, 1989 as the date from which the prohibition against the production, possession, use, consumption, purchase, sale, transport, warehousing, import interstate and export inter-State of ganja for any purpose other than medical and scientific purposes shall take effect.'

Paragraph 1.3 of the standing instruction No. 1 of 1988 issued by the Narcotics Control Bureau states as follows:

'All illicit narcotic drugs or psychotropic substances recovered from a person, place, conveyance etc. are material evidence as they are liable to confiscation. Further, they constitute primary evidence for any act, omission or commission on the part of a person rendering him liable for punishment under Chapter IV of the N.D.P.S. Act, 1985. Most of the narcotic drugs and psychotropic substances cannot be conclusively proved, to be such drugs or substances merely by visual examination in the trial court and they require to be proved by chemical analysis to be conducted by chemists authorised under Section 293 of Cr. P.C. 1973.....'

What is the required quantity of the sample of the narcotic drugs that should be sent for chemical test has been provided in para 1.6 of the aforesaid instruction. It reads as follows:

'1.6. Quantity of different drugs required in the sample.

The quantity to be drawn in each sample for chemical test should be 5 grams in respect of all narcotic drugs and psychotropic substances except in the cases of opium. Ganja and charas/hashish where a quantity of 24 grams in each case is required for chemical test. The same quantities should be taken for the duplicate sample also. The seized drugs in the packages/containers should be well mixed to make it homogeneous and representative before the sample in duplicate is drawn.'

The Central Government in the Ministry of Finance (Department of Revenue) in exercise of powers conferred by Sub-section (1) of Section 52A has issued standing order No. 1 of 1989 dated 13th June, 1989 which, inter alia, deals with the manner of disposal of different drugs. Relevant portions of the Standing Order are extracted hereunder:

'Section 1 - Drugs (sic) for Disposal,

1. Narcotic Drugs:

(1) Opium

(2) Morphine

(3) Heroin

(4) Ganja

(5) Hashish (Charas)

(6) Codeine

(7) Thebaine

(8) Cocaine

(9) Poppy Straw; and

(10) Any other manufactured drug, as defined under clause (xi) of Section 2 of the Act.

Psychotropic Substances:

(1) Methaqualone

(2) T.H.C.

(3) Amphetamine, and

(4) Any other psychotropic substance, as defined under clause (xxiii) of Section 2 of the Act.

Para 2.3 of Section II of the aforesaid Standing Order further provides : 'The quantity to be drawn in each sample for chemical test shall not be less than 5 grams in respect of all narcotic drugs and psychotropic substances save in the cases of opium, ganja and charas (hashish) where a quantity of 24 grams in each case is required for chemical test. The same quantities shall be taken for the duplicate sample also. The seized drugs in the packages/containers shall be well mixed to make it homogeneous and representative before the sample (in duplicate) is drawn.'

The aforesaid instructions and/or Standing Orders unmistakably and beyond any pale of doubt require that chemical examination was necessary to determine whether the seized article was ganja. In the instant case for successful

prosecution of the case it was necessary to establish the primary evidence, i.e., the seized article was ganja. In absence of chemical examination and merely on the basis of the oral statement of P.W. 3, it cannot be held that what was seized from the appellant was ganja. The basis of the prosecution having been not established, the appellant is entitled to be acquitted.

10. In the result, the conviction and sentence of the appellant are hereby set aside. The appellant is acquitted of the charge. The appeal is accordingly allowed.

11. I place on record my appreciation of the assistance rendered by Shri H.C.P. and, Deputy Commissioner of Excise, Orissa, in making me available the relevant. Standing Orders/Instructions issued by a Government of India and Narcotic Control Bureau on the point at issue.

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