

Jayakrushna Parida Vs. State of Orissa

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Court : Orissa

Decided On : Sep-11-1996

Reported in : 83(1997)CLT257; 1997CriLJ2179

Judge : C.R. Pal, J.

Acts : [Narcotic Drugs and Psychotropic Substances Act, 1985](#) - Sections 18, 20, 20(1), 42, 42(1), 42(2), 50, 52, 52(3), 55 and 57

Appeal No. : Jail Criminal Appeal No. 261 of 1993

Appellant : Jayakrushna Parida

Respondent : State of Orissa

Advocate for Def. : Jairaj Behera, Addl. Govt. Adv.

Advocate for Pet/Ap. : S. Nayak, Adv.

Disposition : Appeal allowed

Judgement :

C.R. Pal, J.

1. This appeal is directed against the order of conviction and sentence dated 28-7-1993 passed by the learned 1st Addl. Sessions Judge, Puri in Sessions Trial Case No. 36/ 128 of 1992 wherein the appellant has been convicted and sentenced

under Section 18 of the [Narcotic Drugs and Psychotropic Substances Act, 1985](#) (in short, 'the Act') to undergo rigorous imprisonment for ten years and to pay a fine of Rs. 1,00,000/- (rupees one lakh), in default, to undergo rigorous imprisonment for a further period of two years and under Section 20(b)(1) of the Act to undergo rigorous imprisonment for a period of two years and to pay a fine of Rs. 10,000/- (rupees ten thousand), in default, to undergo rigorous imprisonment for a further period of one year. The sentences were to run concurrently.

2. The case against the appellant is that on 24-10-1991 the S.I. of Police, Kakatpur (P.W.9) receiving information about the selling of Opium and Ganja at Kundhei Hat proceeded to Kundhei Hat along with two O.S.A.P. Staff (PWs. 1 and 2), a lady Home Guard (P.W.7) and A.S.I. (P.W.8) and reached there at about 4.20 p.m. On reaching at Kundhei Hat they found the appellant selling Opium and Ganja inside the Hat. They encircled the appellant and on search the S.I. recovered a bag from the appellant which contained a Tin Can (Diba) containing 1 (X) grams of Ganja, two earthen pipes (Chillam), one Polythene paper containing 11 grams of Opium, one Kutuni, one Prem Katari, One Knife having wooden handle, a raxin hand bag with a cycle spoke, another small Tin Diba and cash of Rs. 42.75 paise. He seized the contraband articles, submitted a written report, Ext. 2 and accordingly a case was registered. The appellant was arrested and was forwarded to the Court. The seized contraband articles were sent for chemical examination and after obtaining the Chemical Examiner's report, the Ext. 4, which revealed that the contraband articles sent for examination were Opium and Ganja, charge-sheet was submitted against the appellant under Sections 18 and 20(b) of the Act.

3. The appellant was charged Under Section 18 of the N. D. P. S. Act for possessing Opium and Under Section 20(b) for possessing Ganja to which he pleaded not guilty and claimed to be tried. It is his case that the case is falsely foisted against him.

4. In course of trial, the prosecution examined as many as nine witnesses out of whom P.Ws. 1 and 2 are the O.S.A.P. staff, P.W.7 is a lady Home Guard. P.W.8 is the A.S.I. of Police. P.Ws. 3, 4, 5 and 6 are the other witnesses to the seizure, and P.W.9 is the S.I. who is also the Investigating Officer of this case. The trial Court

believing the evidence adduced by the witnesses passed the impugned order of conviction and sentence.

5. The learned Counsel appearing for the appellant assails the order of conviction and sentence mainly on the grounds of non-compliance of the requirements of Sections 42, 50, 52, 55 and 57 of the Act. It is noticed from the judgment of the trial Court that such contentions were raised before the trial Court, but the same were rejected on the ground that the provisions are not mandatory and the appellant cannot get any benefit unless it is shown that the alleged non-compliance resulted in any prejudice to the appellant.

6. It is contended by the learned Counsel of the appellant that for non-compliance of Sections 52 and 57 of the Act the order of conviction and sentence based on the uncorroborated evidence of the I.O. on vital aspect is illegal. It is a settled principle that provisions of Sections 52 and 57 are not mandatory by themselves and non-compliance thereof shall not affect the prosecution case unless prejudice is established. In the above context, it is noticed that Ext. 2 (F.I.R.) is silent as to whether the appellant was informed about the grounds of his arrest. None of the witnesses has deposed that the appellant was informed about the grounds of arrest. Such information about the grounds of arrest would have made the appellant aware at the very outset what he had to meet in the long run. Failure to do so has, therefore, certainly caused prejudice to his defence. There is also no evidence to show that a full report of search, seizure and arrest was sent to the official superior within forty-eight hours of the detection as required under Section 57 of the Act. By not submitting a full report about the search, seizure and arrest the appellant was deprived of testing the truthfulness of the evidence adduced by P.W.9 with reference to the report contemplated Under Section 57 and to that extent the appellant has been prejudiced in making his defence. Therefore, failure to submit the report must affect the evidence adduced by the prosecution adversely. For the above reason, the uncorroborated evidence of P.W.9 cannot be accepted as it is.

7. One of the contentions raised by the learned Counsel for the appellant is that the S.I. though proceeded to effect the search and seizure on the basis of

information received by him failed to take down the information in writing which contravene the mandatory provisions of Section 42(1) of the Act. In this context, it is noticed from the F.I.R. Ext. 2 that the P.W.9 along with other staff proceeded to Kundhei Hat on getting reliable information. Ext. 2, the F.I.R. was submitted by P.W.9 after affecting the search and seizure, but there is no mention about taking down the information in writing before proceeding to effect the search. There is no evidence on record to show that the P.W.9 sent a full report of seizure and arrest to his immediate official superior as required under Section 57 of the Act. Failure to satisfy the requirements of Section 57 of the Act shall have its necessary impact adversely on the veracity of the witnesses. All other witnesses excepting P.W.9 are also silent on this point. P.W.9 of course, has stated in paragraph 14 of his cross-examination as under:

'...I did make S.D. entry regarding the information I had received....'

But the prosecution did not produce and prove the said station diary entry. P.W.9 in this context has also stated that the S.D. entry has not been produced before the court. He has also admitted not to have mentioned about the station diary entry in the case diary. Considering his failure to fulfil the requirements of Section 57 of the Act and in absence of corroboration from any other witness or document, his version given in the Court to the effect that he made a station diary entry regarding the information received by him cannot be believed. This leads to hold that there was non-compliance of mandatory provisions of Section 42(1) and also the provisions of Section 42(2) which vitiates the trial.

8. It is next contended by the learned Counsel for the appellant that for non-compliance of Section 50 of the Act which is mandatory, the trial vitiates and the appellant is entitled to an acquittal. It is settled principle of law that Section 50 of the Act is mandatory. In this context reference may be made to *State of Punjab v. Balbir Singh*, AIR 1994 SC 1872 : (1994 Cri LJ 3702), wherein the Apex Court has held that it is an imperative requirement on the part of the officer intending to search to inform the person to be searched of his right that if he so chooses, he will be searched in the presence of a Gazetted Officer or a Magistrate. Failure to inform the person to be searched and if such person so requires failure to take him

to the Gazetted Officer or the Magistrate would amount to non-compliance of Section 50 which is mandatory and thus it would affect the prosecution case and vitiate the trial. Keeping in view the above proposition of law, it is to be seen from the evidence on record whether the appellant was made aware about his right to be searched either before a Magistrate or a Gazetted Officer. In this context, it is noticed that the F.I.R. Ext. 2 is silent on this point. None of the witnesses excepting the P.W.9 has stated that the P.W.9 made the appellant aware about his right to be searched either in presence of a Gazetted Officer or a Magistrate. The P.W.9 of course in his evidence before the Court has deposed that the accused was asked for his option to be searched by any P.W.9. In this context, it may be mentioned here that there is no other Magistrate or by P.W.9 to which the appellant consented to be searched by evidence to corroborate the version of P.W.9 that the appellant was made aware about his right and the appellant expressed his willingness to be searched by P.W.9. The documents, such as the F.I.R., Ext. 2 is also silent about it. There is no other contemporaneous document to corroborate the version of P.W.9 on this score. Therefore, the evidence given by P.W.9 in court relating to the exercise of option by the appellant cannot but be held to be a subsequent improvement made to the prosecution story particularly when it is noticed that the I.O. has not submitted a detailed report about the seizure and arrest to his immediate official superior as envisaged under Section 57 of the N.D.P.S. Act. Such failure must affect the veracity of the witnesses adversely. Thus, the uncorroborated evidence of P.W.9 cannot be accepted to record a finding that the appellant was made aware about his right to be searched either before a Magistrate or Gazetted Officer. The finding recorded by the trial Court cannot, therefore, be supported. It must be held that due to non-compliance of the provisions of Section 50 of the Act the trial is vitiated.

9. It is also contended by the learned Counsel for the appellant that in absence of any definite proof that the articles said to have been recovered from the appellant were properly sealed and kept in proper custody till their production before the Court, the conclusion made by the trial Court that the contraband articles were recovered from the possession of the appellant is not well founded. The learned Addl. Govt. Advocate, on the other hand, contended that when the articles were sent to the Chemical Examiner and the Chemical Examiner's report, Ext. 4 shows

that he received the packets in sealed condition that is enough to establish the prosecution story and no adverse inference can be drawn against the prosecution. In the above context, it is noticed from the evidence of witnesses on record that none of them excepting P.W.9 has deposed that the seized articles were sealed. From the evidence of P.W.9 it appears that he sealed the articles using the impression of a 25 paise coin as a seal in absence of any brass seal. In this context the P.W.9 has deposed that 'All the articles were kept inside the bag and then the bag was sealed with wax. As the brass seal was not available, I put the impression of 25 paise coin on the seal. That 25 paise coin was made over to Ashok Khatai'. Ashok Kumar Khatai has been examined as P.W.6 in this case, but he denied to have been the actual seizure though he has admitted to have known the contents of the seizure list prepared by P.W.9. However, he is totally silent about the sealing of the seized articles and use of 25 paise coin as the seal in absence of brass seal. P.W.8, the A.S.I. of Police does not also support the version of P.W.9. The P.W.9 does not say as to where he sealed the seized articles. From his evidence it appears that he brought the seized articles and kept the same in the Malkhana of Police Station which was in his charge. The seized articles were not produced before the D.I.C. which amounts to violation of Section 52(3) of N.D.P.S. Act. No separate seal of D.I.C. was put on the seized packet before keeping it in Police Malkhana which amounts to contravention of Section 55. The seal used is commonly available. The seized articles were in charge of P.W. 9 from 24-10-91, the date of seizure, till 13-1-1992 when the same were produced before the Court for sending the same to the Chemical Examiner. In the above circumstances, it is difficult to exclude chance of manipulation and hold that the seized articles produced before the Court on 13-1-92 were the articles recovered from the appellant. For the above reasons, the impugned order of conviction and sentence is also liable to be set aside.

10. In the result, the appeal is allowed. The impugned order of conviction and sentence is set aside and the appellant is acquitted of the charges under Sections 18 and 20(b)(1) of N.D.P.S. Act. He be set at liberty forthwith if his detention is no longer required in connection with any other case.

