

Hakam Singh Vs. Union Territory

Hakam Singh Vs. Union Territory

SooperKanoon Citation : sooperkanoon.com/619086

Court : Punjab and Haryana

Decided On : May-22-1987

Reported in : 1989(22)ECC315

Judge : Ujagar Singh, J.

Appeal No. : Criminal Appeal No. 235-SB of 1987

Appellant : Hakam Singh

Respondent : Union Territory

Disposition : Appeal allowed

Judgement :

Ujagar Singh, J.

1. Recovery of 1.5kg of crushed poppy heads had led to the conviction of the appellant for which he has been sentenced to undergo rigorous imprisonment for 10 years and to pay a fine of Rs. 1,00,000/- or in default of payment of fine, to undergo further rigorous imprisonment for 5 years and the same has been challenged in this appeal.

2. ASI Manjit Singh, along with constables Sukhchain Singh and Mohan Singh, was present at the back side of the Punjab University Campus., Chandigarh, at about 7.30 p.m., on 29-4-1986. He received secret information that the appellant

would be passing by the bus stop of village Dhanas while carrying crushed poppy heads. Mohan Singh, a clerk in the Electricity Department, passed by that side and he was joined by the ASI. Thereafter the party proceeded towards the said bus stop and the site was picketed. After some time, the appellant was noticed coming from the side of village Saranpur. The appellant on reaching the bus stop and seeing the Police Party, turned back whereupon he was overpowered on suspicion. From his right hand, Jhola Ex.P-1 was recovered and after the ASI gave his personal search to the appellant, the person of the appellant was searched from the Jhola carried by him, crushed poppy heads, weighing 1.5 Kg. were recovered and the appellant could not produce any permit for possession thereof. The glazed paper in which it was carried was taken into possession. Ruqa was sent for the registration of the case through Constable Sukhchain Singh and First Information Report was recorded on its basis. After completing the various formalities of investigation, report under Section 173, Criminal P.C. (briefly the Code) was presented before the Illaqua Magistrate. Scaled bag of the crushed poppy heads was sent for chemical examination through constable Jagdish Singh and according to the report of the Chemical Examiner morphine and meconic acid were found present in the same.

3. After going through the documents, the Magistrate committed the case for trial before the Sessions Court. The Sessions Judge, after framing the charge for an offence under Section 18, Narcotic Drugs and Psychotropic Substances Act, 1985 (61 of 1985) (shortly the Act), to which the appellant pleaded not guilty, examined Constable Mohan Singh (P.W. 1), Jaswant Singh Draftsman (P.W. 2) who prepared the site plan of the place of recovery; Mohan Singh, said clerk (P.W. 5) and ASI Manjit Singh (P.W. 6). The prosecution tendered the affidavits of Constable Jagbir Singh and MHC Thakur Singh as P.W.3 and P.W. 4 respectively. The appellant in his statement under Section 313 of the Code took up the plea that he has been falsely implicated and the prosecution witnesses have deposed falsely against him. He has further stated that on 28.4.1986, at about 6 p.m., ASI Manjit Singh, in the company of Sub-Inspector K.I.P. Singh, S.I. Kartar Singh, ASI Baldev Singh and some constables, raided his house and also searched the houses of Dalip Singh, Sat Pal and Sanjogta, but nothing was recovered from any of those houses. In spite of this, he further stated that all the four of them were

taken to Police Station Sector 11, Chandigarh and detained there for the night till the next evening i.e. up to 7.30 p.m. when this case was foisted upon him and three other cases were foisted on the said three persons. It has also been stated by him that the said Dalip Singh has since been acquitted by the learned Additional Sessions Judge, Chandigarh and he has tendered Ex. DA, certified copy of the judgment dated 5.11.1986.

4. The learned Counsel for the appellant has challenged the conviction and sentences passed by the trial Court mainly on the ground that the provisions of the Act are mandatory and there is no evidence on the file to show that any of the said provisions has been complied with. He has further vehemently urged that the presence of Mohan Singh (P.W. 5) is most doubtful and has pointed out that no person from public, present at the bus stop, was joined apart from the above argument, he has pointed out certain discrepancies on material particulars in the statements of the prosecution witnesses.

5. The Act has repealed the Opium Act (13 of 1857), the Opium Act, 1878 (1 of 1878) and the Dangerous Drugs Act, 1930 (2 of 1930) and a specific procedure has been laid down for arresting of the persons their search, deposit of the article recovered, taking samples therefrom etc. under different sections of the Act, but has saved the application of the provisions of the Code, in so far as the same are not inconsistent with the provisions of the Act with respect to the warrants issued, arrests, searches and seizures thereunder. Under the Opium Act, 1878 there was no procedure prescribed except that the possession of opium without licence was made punishable and there was no minimum punishment prescribed, but the whole matter of punishment was left to the discretion of judicial Courts which used to be exercised according to the facts and circumstances of each case. The Act has prescribed minimum punishment of rigorous imprisonment of 1.0 years and fine of Rs. 1,00,000/- irrespective of the quantity recovered, with enhanced punishment for offenses after the previous conviction of the person concerned. Section 32 of the Act provides imprisonment for a term which may extend to six months, or with fine, or with both for a person who contravenes any provision of the Act or any rule or order made, or any condition of any licence, permit or authorisation issued thereunder for which no punishment is separately provided.

Section 33 of the Act excludes the application of Section 360 of the Code in respect of a person convicted of an offence thereunder unless such person is under 18 years of age or the offence for which such person is convicted is punishable under Section 26 or Section 27 thereof. Section 26 provides punishment for certain acts by a licensee or his servant. Section 27 provides punishment for illegal possession in small quantity of any narcotic drug or psychotropic substances for personal consumption and discretion has been given to the Courts for awarding sentence which may extend to one year or with fine or with both and six months or with fine or with both, as the case may be, but this section puts the burden of proving the ingredients thereof on the person concerned.

6. Chapter V of the Act provides the procedure in detail, Sub-section (2) of Section 41 thereof envisages that the officer arresting a person or searching a building, conveyance or a place whether by day or by night may do it himself when such officer is empowered in this behalf by general or special order by the Central Government or by the State Government, but he can do so only if he has reason to believe from personal knowledge or information given by a person and taken in writing that any person has committed an offence punishable under Chap. IV of the Act or that any narcotic drug or Psychotropic substance, in respect of which any offence punishable under Chap. IV of the Act has been committed, has been kept. In the present case, according to the prosecution, a secret information was received by A.S.I., Manjit Singh (P.W. 6) in the course of his patrolling in connection with checking of commission of offence. This secret information was not reduced in writing and no such writing, if at all, has been produced, as evidence in court. The case of prosecution, in brief, is that on receiving the above said secret information and after joining Mohan Singh (P.W. 5), the Police Party proceeded to local bus stop of village Dhanas and when the appellant came towards that place, he was overpowered on suspicion. It is only thereafter when on search crushed poppy heads were recovered that the Ruqa in writing was sent for the registration of the case. Sequence of events narrated by the prosecution witnesses excludes even an attempt by the Police Party to have the alleged secret information reduced into writing. This provision cannot be said to be only a formality. The purpose behind the same is that the story of secret information may

not be concocted to support any version put in court.

The learned Counsel for the respondent has referred to *Radha Kishan v. State of Uttar Pradesh* : (1963) IILLJ667SC and *Khandu Sonu v. State of Maharashtra*, : 1972 CriLJ593 and has vehemently argued that any search in contravention of the provisions of the Act and invalidity of investigation do not vitiate the trial. The *Radha Krishna's* case (supra) the Supreme Court refused to reexamine the evidence of satisfying itself as to the correctness or otherwise of the conclusions reached by the High court by which the evidence of the prosecution with regard to the factum of seizure was accepted. It is of no help to the proposition propounded. *Khandu Sonu's* case (supra) relates to investigation under the Prevention of Corruption Act where in it was held by the Supreme Court that invalidity of the proceeding investigation would not vitiate the conviction of the accused, as a result of trial, but, at the same time, it was laid down that the illegality in the investigation should not cause prejudice to the accused or bring about miscarriage of justice. Under the provisions of the Prevention of Corruption Act, the penalty is not so stringent as in this case. This Act, as already stated, provides a minimum sentence of imprisonment and fine and, therefore, deviations from the provisions thereof have to be scrutinized.

7. Section 43 of the Act gives power of entry, search, seizure and arrest without warrant or authorisation of any such officer who is empowered in this behalf by general or special order of the Central Government or of the State Government, but he can do so only if he has reason to believe from personal knowledge or information given by any person and taken down in writing. As already discussed. ASI Manjit Singh got a secret information, but it was not taken down in writing. This prerequisite is not laid down without any purpose. Its contravention, would certainly cause prejudice to the accused, because, in the absence of any writing, there will be no chance to cross-examine the officer with regard to the factum and contents of the information received.

8. Before making a search, the provisions of Section 50 of the Act lay down that the officer who is duly authorised will not conduct any search, if the person to be searched so requires, before taking such person to the nearest gazetted officer of

any of the Departments mentioned in Section 42 of the Act or to the nearest Magistrate. The words 'if such person so requires', are mandatory and the officer has to ask the person if he wanted to be taken to the said nearest gazetted officer or to the nearest Magistrate. Unless the person to be searched is informed about his right, the said words would not come into operation. In the present case, there is no evidence that the appellant was informed of his right at any time before his person was searched.

9. Section 52 gives another mandatory provision, according to which, the officer arresting a person, shall as soon as may be, inform him of the grounds for such arrest and the person arrested and the article seized under warrant shall be forwarded without unnecessary delay to the Magistrate by whom the warrant was issued or to the officer, in charge of the nearest Police Station or the officer empowered under Section 53 of the Act. It further lays down that the authority or officer to whom any person or article is forwarded shall with all convenient despatch take such measures as may be necessary as to the disposal according to law of such person or article. There is another mandatory provision under Section 55 of the Act. According to this section, the officer in charge of a Police Station shall take charge of and keep in safe custody, pending the orders of the Magistrate, all articles seized under this Act within the local area of that police station and which may be delivered to him, and shall allow any officer who may accompany such articles to the police station or who may be deputed for the purpose to affix his seal to such articles or to take samples of and from them and all samples so taken shall also be sealed with a seal of the officer-in-charge of the police station. The evidence in the present case shows that from the personal search of the appellant, crushed poppy heads, weighing 1.5. Kg. were recovered and taken into possession after sealing the same at the spot itself and the requirement of the officer accompanying the articles to the police station and then to affix his seal to such article, has not been complied with. As a matter of fact the intention of the Parliament was to ensure fair investigation by responsible officers and to do away with a common complaint that officials of lower ranks have started abusing their powers, especially when consistently it has been held that the testimony of a police officer is like the testimony of any other individual.

10. The Act received the assent of the President on the 16th September 1985, and was published in the Gazette of India, Extraordinary, Part II, Section 3(1), No. 75, dated September 16, 1985 and this recovery took place on 29.4.1986. No doubt, according to Section 74 of the Act, every officer or other employee of the Government exercising or performing, immediately before the commencement of this Act, any powers or duties with respect to any matters, provided for in this Act, shall, on such commencement, be deemed to have been appointed under the relevant provisions of this Act to the same post and with the same designation as he was holding immediately before such commencement, but this provision is only a transitional provision and it cannot be taken advantage of for any period to the discretion of the officer, the Central Government or the State Government. The very word 'transitional' used in the heading of this section leaves no doubt that this provision was meant only for a very limited period to enable the Central Government or the State Government to specially authorise officers by general or special orders at an early date.

11. Even otherwise, Section 74 does not lay down that the mandatory provisions other than the provisions, of Section 41 and 44 of the Act can be ignored by officer with the help of Section 74. It is very clear that mandatory provisions of the Act have been ignored altogether and this has caused a material prejudice to the appellant.

12. In view of the above discussion, this appeal is accepted; conviction and sentence imposed by the trial Court are set aside and the appellant is acquitted of the charge. Fine if paid, be refunded.