

Wilson Dayal Vs. State

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Court : Delhi

Decided On : Nov-11-1992

Reported in : 1993CriLJ1188; 1993(1)Crimes207; 49(1993)DLT414; 1993(25)DRJ49

Judge : Usha Mehra, J.

Appeal No. : Crl. Appeal No. 22 of 1988

Appellant : Wilson Dayal

Respondent : State

Advocate for Pet/Ap. : Ms. Neelam Grover, Adv

Judgement :

1. Shri Wilson Dayal, son of Nagdayal was convicted and sentenced to undergo rigorous imprisonment for 10 years and a fine of Rs. 1,00,000/-. In default of payment of fine he was to undergo simple imprisonment for a period of 1-1/2 years.
2. He was sentenced and convicted vide orders dated 7th November, 1987 and 10th November, 1987 respectively.
3. Ms. Neelam Grover, Advocate, was appointed as amices Curiae since the petition was though Jail. She has assailed the impugned order inter-alia on the

ground that there is a clear violation of the provisions of Section 50 and 55 of the Narcotic Drugs and Psychotropic Substances Act (hereinafter called as the 'Act'). There is a non-compliance of the provisions of law when the sealed sample was not deposited with the CFSL expeditiously but was deposited after two months. There was on filling of the CFSL form nor deposit of the same in the Mohrarr Malkhana leaving to the only irresistible conclusion that there was a tampering of the sample and the contents of the parcel.

4. In order to appreciate the point raised by Ms. Grover, at the bar, it will be worthwhile to know in brief the facts of the case.

5. That the appellant was found in the prohibited area under the jurisdiction of Air Force Station Palam by two personnel of Air Force Police Station at about 2 p.m. on 18-9-1986. According to the prosecution story, the said two police personnel of air force namely warrant officer N.M. Gureja and Sg. Narain Singh were patrolling the area. According to them the appellant was going on the road at that time. The appellant on seeing air force police, tried to retrace his steps which aroused suspicion and the air force police checked the appellant with a view to ascertain his identity. According to prosecution, just at that moment S.I., K. C. Ahluwalia and Constable Ram Nath of Delhi Police happened to reach the spot where the appellant had been stopped.

6. It is further the case of the prosecution that the appellant was carrying a bag in his hand which on being search by S.I., K. C. Ahluwalia the charas was found there. Since the market was closed, therefore, the appellant was taken to a nearby shop where the charas was weighed and found to be 900 gms. in weight.

7. 50 grams, of charas was separated from the quantity recovered from the appellant as a representative sample which was sent to the office of the CFSL. On receipt of the report from the CFSL which indicated that the sample was charas, a case was registered against the appellant under section 21 of the Act.

8. The prosecution examined as many as 10 witnesses. The case of the prosecution primarily rests on the testimony of Narain Singh Yadav, P.W. 1, Head Constable Shiv Raj Singh, P.W. 3, Constable Hardev Singh, P.W. 4, report of the

CFSL, Warrant Officer M. N. Gureja, P.W. 7 and S.I., K. C. Ahluwalia, P.W. 8.

9. In order to appreciate the contention of Ms. Grover that there is a clear violation of the provisions of Section 50 of the Act, we must understand what is provided under section 50, which has been violated. Section 50 reads as under :

SECTION 50

CONDITIONS UNDER WHICH SEARCH OF PERSONS SHALL BE CONDUCTED - (1) When any duty officer duly authorised under section 42 is about to search any person under the provisions of Section 41, Section 42 or Section 43, he shall, if such person so requires, take such person without unnecessary delay to the nearest Gazetted Officer of any of the department mentioned in Section 42 or to the nearest Magistrate.

(2) If such requisition is made, the officer may detain the person until he can bring him before the Gazetted Officer or the Magistrate referred to in sub-section (1).

(3) The Gazetted Officer or the Magistrate before whom any such person is brought shall, if he sees no reasonable ground for search, forthwith discharge the person but otherwise shall direct that search be made.

(4) No female shall be searched by anyone excepting a female.

10. The bare reading of Section 50 shows that there is a requirement of the arresting officer to take the accused to the nearest Gazetted Officer of any department mentioned in Section 42 or to the nearest Magistrate. The option to be searched before the Gazetted Officer or before the Magistrate has to be given by the Arresting Officer to the accused and after that option is given it is his choice to opt for the Gazetted Officer or for the Magistrate. The requirement of law is that such an option must be given. If the accused is deprived of being searched before responsible officer as envisaged under the Act then it will amount to legislature (sic). The legislature prescribed stringent punishment against the person dealing, manufacturing or selling the drugs. Since the punishment is severe therefore the compliance of the procedure prescribed under the provisions of the Act become all the more essential. Non-compliance of these provisions, which the statute requires

to be complied with, will create doubt in the taking of sample and about the arrest. Benefit of the non-compliance of the provision of law will go to the accused. Sub-section 3 of Section 50 further envisages that when the accused is produced before the Gazetted Officer or Magistrate, he has the right to discharge such an accused if he comes to conclusion that there is no reasonable ground for search. thereforee, the intention of the legislature becomes clear from the bare reading of these sections. Legislature has given the mandate which has to be adhered to and complied with. The mandate given in Section 50 is not an empty formality. It has the sanctity behind. In this case from the testimony of Sargent Narain Singh Yadav, P.W. 1, it is clear that the I.O. SI K.C. Ahluwalia never offered the petitioner to be searched before a Gazetted Officer or before a Magistrate. SI K. C. Ahluwalia appearing as P.W. 8 nowhere stated that he gave any option to the accused nor he asked the accused to search him before searching the petitioner. The Warrant Officer M. N. Gureja also appearing as P.W. 7 admitted that no offer was made to the accused for being searched before a Gazetted Officer or before a Magistrate nor the Investigating Officer offered himself to be searched by the accused. thereforee, to my mind, in view of this admitted position on record, the only conclusion which can be reached is that in this case there is clear violation of the provision of Section 50 of the Act.

11. Ordinarily I would have acquitted the accused on this ground itself. But, Ms. Grover has taken pains in preparing this case as amices Curiae and has done Justice when she brought to the notice that how the investigating Officer can play with the life and liberty of an individual. For nearly two months the sample after being taken was kept with the Moharrar Malkhana. No good reason has been assigned for its non deposit in the office of CFSL. Admittedly, the sample was taken on 19th September, 1986. It was deposited with the Moharrar Malkhana by the Investigating Officer S.I., K. C. Ahluwalia on 19th September, 1986 itself. Till 21st October, 1986 the sample was never sent to the office of the CFSL. Why it remained with the Moharrar Malkhana, not a whisper is there On 21st October, 1986, the seal parcel was sent to the office of the CFSL but was not deposited there. No reason has been assigned for the same. Again it was sent on 4th November and 5th November, 1986 but the same could not be deposited because it was taken late. According to Constable who took the sample to CFSL the

parcels are not accepted in the office of the CFSL after 1.00 p.m. If this fact was told the official on 21st October, 1986 then why did not take the parcel in time on 4th and 5th November, 1986. It was the duty of the Moharrar Malkhana to send the parcel must before 1 p.m. but that was not done. This shows the casual attitude or the case of the prosecution is not straight forward and truthful. Because of non-sending of parcel to the office of CFSL immediately it creates doubt in the case of the prosecution as there is every likelihood of the sample having been tampered with. Simply saying that the sample so long as it remained in custody was never tampered is not enough. The road certificate has not been produced. Had it been produced it would have shown the reason as to why the sample could not be deposited on 21st October, 1986, 4th November, 1986 and 5th November, 1986 respectively. I have no doubt in my mind that the prosecution kept the parcel with the Moharrar Malkhana till such time the I.O. received the seals back from Sargent Narain Singh Yadav, P.W. 1 Mr. Yadav, appearing as P.W. 1 stated that he returned the seals about after two months, Contentions of Ms. Grover has force that it is only when the seal was received back that the parcel was deposited with the CFSL. thereforee, there is every possibility that the sample was tampered and changed as it had only one seal and that was of SI K. C. Ahluwalia.

12. She further urged that there was non-compliance of the provision of Section 55 which provides an officer in charge of a police station shall take charge and keep in safe custody all articles seized under this Act. The Officer in charge in this case is the SHO, but from the testimony of SI K. C. Ahluwalia, the Officer in charge i.e. SHO was not available, and thereforee, the IO deposited these sealed parcels with the Moharrar Malkha without getting the seal of the S.H.O. affixed on the sealed sample. Admittedly, in the present case on the sealed parcels there was only one seal and that was of S.I. K. C. Ahluwalia, the investigating officer. No seal of the Officer in charge of the police station was affixed which is what is the requirement of Section 55 of the Act. thereforee, Ms. Grover was justified in urging that in this case the investigating officer gave a complete go bye to the mandatory provisions of the Act.

13. Besides violating the provision of law the Investigating Officer also in a very shored manner conducted the investigation. He did not bother to join the

Shopkeeper, at whose shop charas was weighment. He ought to have joined the said shopkeeper as witness to the weighed of the charas. No Explanationn has been given as to why he was not joined

14. For the reasons stated above, I am fully convinced that the prosecution has miserably failed to bring home the guilt of the accused. I accordingly allow the appeal and set aside the conviction and sentence passed against the appellant. The appellant be released forthwith if not required in any other case.

15. Appeal allowed.

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