

Jayapalan Vs. State

Jayapalan Vs. State

SooperKanoon Citation : sooperkanoon.com/694849

Court : Delhi

Decided On : Jan-06-1989

Reported in : 37(1989)DLT289; 1989(22)ECC319

Judge : P.K. Bahri, J.

Acts : Narcotic Drugs & [Psychotropic Substances Act, 1985](#) - Sections 50

Appeal No. : Criminal Appeal No. 242 of 1987

Appellant : Jayapalan

Respondent : State

Advocate for Pet/Ap. : Neelam Grover and; S.T. Singh, Advs

Judgement :

Bahri, J.

(1) Appellant has been convicted for an offence punishable under Section 21 of the Narcotic Drugs & Psychotropic Slifastances Act 1985 vide judgment dated August 11, 1987 of Additional Sessions Judge, Delhi and has been sentenced to undergo rigorous imprisonment for 10 years and to pay a line of rupees one lakh and in case of fault in the payment of fine, simple imprisonment for one year vide separate order of the same date. Appellant has challenged his conviction unit sentences by filing the present appeal through jail. Although appeal was barred by

limitation, still the appeal has been admitted to hearing on merits vide order dated Dccen-.ber ifc i^87 by Malik, J.

(2) The case of the prosecution in brief is that S.L Anjani Kumar while posted at Police Station Greater. Kailash Part I had received a secret information w about 2.30 P.M. that some person would be coming in front of Thikana Guest Hou.se. B Block Greater Kailash-1 carrying some narcotics, and he thereafter organized a raiding party comprising of S.I. Kailash Chand, Dayal Singh Kang, Head Constable Suraj Bhan and some. police constables and after joining one Ashwani Kumar, a public witness, the appellant was apprehended at the place pointed out by the secret informer at about 7.30 P.M. and he was found to be carrying a V.I.P. Suitcase in his right hand. There were two other persons also appended who were present Along with the appellant. The Vip Suitcase which was in possession of the appellant was searched and it was found to contain a polythene bag containing the charas and the charas was weighed and it was found to be 900 grams. and after taking sample of 10 grams from the said charas, the same were converted into sealed parcels and sealed with the- seals of the S.I. The case was registered by sending the Rukka Ex. Public Witness 2/A as per Fir, copy of which is Ex. Public Witness 2/B. The sample was sent for analysis and report Ex. Public Witness 41A was received from C.E.S.L.; report showing that the contents of the same gave positive test for charas.

(3) The appellant was not in a position to engage any counsel. so M/s. Neelam Grover. Advocate was appointed amicus curiae to argue the appeal on behalf of the appellant at State expense. I have heard the arguments and gone through the file and find that conviction and sentences of the appellant cannot be sustained. It is clear from the evidence led on the record and from the contents of the F.I.R. that mandatory provisions of Section 50 of the Act have not been complied with. Section 50 of the Act read as follows : 50.

(1) When any 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 departments 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 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.

So, it was incumbent on the part of the Investigating Officer to have given the option to the appellant that search can be carried out in presence of a gazetted officer or Magistrate and only after the appellant had exercised his option that the search of the appellant could be carried out. In the present case such an option was not given to the appellant before his bag was searched and the charas was recovered. There is mention in the Rukka Ex. Public Witness /2A that after the recovery has been effected the option was given to the appellant that he can be produced before A.C.P. This option was on the face of it an illusory option inasmuch as the search of the appellant had already been carried out and the recovery has also been effected. In a similar type of case, the Punjab and Haryana High Court had come to the conclusion that non-compliance of such a mandatory provision vitiates the recovery. In *Hukum Singh versus Union Territory of Chandigarh*, 1979 Cri. Law Journal 528(1), while referring to Section 50 of the Act, it was held that as the prosecution has failed to show that the provisions of the said Act have been complied with the conviction of the appellant, was vitiated. No evidence was led in the said case to show that accused in that case was infringed of his right at any time before his personal search was carried; that he could require to be taken to nearest Gazetted Officer or nearest Magistrate for his personal search.

(4) The prosecution case also suffers from another important prima inasmuch as even the provisions of Section 42 of the Act are not proved to have been complied with. It is admitted by Public Witness -5. Investigating Officer that he had received the secret information regarding the presences of certain persons carrying some

narcotics while he was sitting at the police station and he admits .that he had reduced that information. in writing by recording the same in the daily diary but for reasons unknown the said copy of the daily diary has not been placed on the record. So, it would mean that in fact the provisions of Section 42 of the Act have not been shown to have been complied with. There can be cases where it may become impracticable to comply with the provisions of. Section 42 of the Act. Present is not such a case inasmuch as here the Public Witness -5 states that he had reduced the information into writing in the daily diary. If that is so, the said daily diary ought to have been proved in this case. It is not the case of the prosecution that it was somewhat impracticable to comply with the provision of Section 42 of the Act in the present case.

(5) Coming to merits of the case I find that the only independent witness pinned Public Witness -1. Ashwani Kumar has not identified the appellant as the person from whom the alleged recovery to charas was effected. It is also surprising that Investigative Officer had chosen to join this witness knowing very well that a murder case registered against his son was under investigation with the same 1.0. So, it appears that no sincere effort has been made by the 1.0. to join independent public witness before apprehending the appellant. A witness who was under the thumb of the 1.0. has been joined and he also did not support the prosecution version that the charas in question was recovered from the appellant. At any rate a doubt regarding the genuineness of the prosecution case arises on account of the aforesaid facts. The counsel for the appellant also drew my attention to certain vital discrepancies appearing in the statements of the witnesses with regard to the efforts made for joining public witnesses and when and where the seal of the S.H.O. was fixed on the case property inasmuch as in copy of the entry of the Malkhana Register Ex. Public Witness j6-A there is no mention that the sample and the other case property had any other seal affixed on them except the seal of the 1.0.

(6) In view of the above discussion I hold that it is not proved beyond shadow of doubt that appellant had committed the offence. I allow the appeal and set aside the impugned orders and acquit the appellant.

