

Sunil Kumar Vs. State

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Court : Delhi

Decided On : Nov-17-1994

Reported in : 1995CriLJ3931; 1995(1)Crimes286; 1994(31)DRJ507

Judge : V.S. Aggarwal, J.

Acts : [Narcotic Drugs and Psychotropic Substances Act, 1985](#) - Sections 20

Appeal No. : Criminal Appeal No. 69 of 1991

Appellant : Sunil Kumar

Respondent : State

Advocate for Pet/Ap. : N.K. Handa, Adv

Judgement :

V.S. Aggarwal, J.

(1) This is an appeal directed against the judgment and the order of sentence passed by the Additional Sessions Judge, Delhi, dated 28th February, 1991 and 2nd March, 1991 respectively. The appellant Sunil Kumar was held guilty of the offence punishable under Section 20 of the [Narcotic Drugs and Psychotropic Substances Act, 1985](#) (hereinafter referred to. as the Act) and sentenced to ten years rigorous imprisonment and a fine of Rs.1,00,000.00 (Rupees one lakh only). In default of payment of fine, he was to undergo further simple imprisonment for

one month.

(2) The sum and substance of the prosecution case is that on 19th August, 1990, Assistant Sub Inspector Om Parkash was patrolling accompanied by Constables Om Parkash, Balvinder Singh and Sumer Singh. While patrolling, they reached near Hanuman Mandir. Secret information was received that one person is sitting near Suthrishah Mandir and is selling charas. A raiding party was organized. Partap Singh son of Ram Singh, a public witness was joined in the raiding party. Other public persons refused to join the said raiding party.

(3) At about 9.00 P.M., Shri Chander Mohan, Officer in charge of the Police Station arrived there and was apprised of the facts. The appellant was apprehended near Suthrishah Mandir at the pointing out by the informer. The accused/appellant was informed that he is suspected to be in possession of charas and that if he likes his person can be searched before a Gazetted Officer of a Magistrate. He spurned the offer.

(4) The person of the appellant was searched and from the right pocket of the trouser of the accused charas wrapped in a polythene paper was recovered which was weighed and found to be 250 gms. Ten grams was taken as a sample. The sample of and the rest of the charas were filled into two different' parcels and sealed with the seals of Cmi and OPD. The form was filled up and facsimile of the seal were fixed on it.

(5) Both the packets were taken into possession vide a recovery memo. The officer in charge of the police station took the articles and deposited in the Malkhana. Head Constable Kal Charan was the 'Malkhana Moharir'. He made the entry in register No. Xix about deposit of the articles at Sr.No.1680 on 24th August, 1990. The sample was sent through Constable Ved Parkash to the C.F.S.L. On receipt of their report that contents were charas, the case as such was put in in Court.

(6) The learned Trial Court believed the prosecution evidence and passed the impugned judgment and the order of sentence referred to above. Aggrieved by the same, the present appeal has been filed.

(7) amices Curiae lawyer had been appointed but no one appeared when the case was listed for hearing. In these circumstances, I did not have the advantage of hearing the learned counsel for the appellant. The file was perused with the help of Mr. N.K. Han'da, Advocate appearing on behalf of the State.

(8) While stringent punishment has been prescribed by the legislature in the Act, at the same time, safeguards have been provided so as to ensure that no prejudice is caused to any person accused of the offence under the Act. One such safeguard is under sub-section (1) to Section 50 of the Act. The said provision unfolds itself in the following words:-

'WHEN any officer duty 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.'

(9) A bare perusal of the provision quoted above leaves no doubt that it is the right of the person to be searched to insist that he be taken without unnecessary delay to the nearest Gazetted Officer of any of the departments mentioned in Section 42 of the Act, or to the nearest Magistrate. This is an extremely valuable right which the legislature has clothed him with and has been incorporated in the Act keeping in view the severity of the sentence. The rationale behind the provision is manifest. A search before a Gazetted Officer or a Magistrate would impart more authenticity and credit-worthiness to the proceedings otherwise the right would become a illusory.

(10) In *Miranda v. Arizona*, (1966) 384 Us 436, the Court, considering the question whether the accused be apprised of his right not to answer and keep silent while being interrogated by the police, observed thus:

'AT the outset, if a person in custody is to be subjected to interrogation, he must first be informed in clear and unequivocal terms that he has the right to remain silent. For those unaware of the privilege, the warning is needed simply to make them aware of it the threshold requirement of an intelligent decision as to its

exercise. More important, such a warning is an absolute prerequisite in overcoming the inherent pressures of the interrogation atmosphere'.

It was further observed thus:

'THE warning of the right to remain silent must be accompanied by the Explanationn that anything said can and will be used against the individual in court. This warning is needed in order to make him aware not only of the privilege, but also of the consequences of forgoing it. It is only through an awareness of these consequences that there can be any assurance of real understanding and intelligent exercise of the privilege. Moreover, this warning may serve to make the individual more acutely aware that he is faced with a phase of the adversary system that he is not in the presence of persons acting solely in his interest.'

(11) The said decision was noted with approval by the Supreme Court of ' India in the case State of Punjab Vs . Balbir Singh : 1994 CriLJ3702 . The Apex Court while holding that provisions are mandatory observed:

'WHEN such is the importance of a right given to an accused person in custody in general, the right by way of safeguard conferred under Section 50 in the context is all the more important and valuable. thereforee it is to be taken as 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. Thus the provisions of Section 50 are mandatory.'

(12) In face of the clear and unambiguous findings arrived at, further probing is unnecessary and it must be held that provisions of sub-section (1) to Section 50 of the Act are mandatory. The person concerned must be told about his right that if he likes his person can be searched before a Gazetted Officer or a Magistrate as referred to above.

(13) Reverting back to the facts of the present case, reference with advantage can be made to the oral evidence on the record. Inspector Chander Mohan, PW-1, Officer in charge, Police Station Kashmiri Gate, testified that he was joined in the

raiding party. He was informed by A.S.I. Om Parkash that secret information has been received. Thereafter the appellant was apprehended at the pointing out of the informer. The appellant was given an option that he could be searched before a Gazetted Officer but he refused the offer. Partap Singh, PW-2, on similar lines made a statement in Court that the appellant had been told that he could be searched before a senior officer but the offer was declined. Constable Sumer Singh, PW-3, and the investigation officer A.S.I, Om Parkash, PW-4, also joined the other witnesses in deposing in the Trial Court that the appellant had spurned the offer that his person can be searched before a Gazetted Officer or a Magistrate.

(14) On closer scrutiny, the said evidence on the face of it is unconvincing and not reliable. None of the witnesses made any statement as to what was the secret information received. It is nobody's guess as to what was told by the informer to the investigating officer. It is not sure as to what was conveyed by A.S.I, Om Parkash after he received the secret information to Inspector Chander Mohan. Otherwise also, it is not clear as to how the accused could exercise his right contemplated in sub-section (1) to Section 50 of the Act when the secret information received was not conveyed to him. It is implicit that once the secret information has been received then where whether ?/Ed. it is recorded or not it should be conveyed to the accused so that he can exercise the right of being taken before a Gazetted Officer or a Magistrate.

(15) To the same effect is the decision of the Division Bench of Bombay High Court in the case of Usman Haidarkhan Shaikh v. State of Maharashtra reported in 1991 (1) Crimes 777. Somewhat a similar question arose before the Bombay High Court. Therein the information had been recorded. The answer was provided in the following words:

'FURTHER it is also clear that there was also non-compliance of section 50 of the N.D.P.S. Act. The said section provides that if a search of any person under the provisions of sections 41, 42 or 43 of the said Act is to be taken, the person whose search is to be taken if requires that the search should be taken in the presence of the Gazetted Officer or the Magistrate, he should be taken to such officer or the

Magistrate and then only the search should be taken. This provision implicitly makes it obligatory on the police officer who is in charge of the raid to inform the accused of the said writing and thereafter only if the accused declines to resort to such search in the presence of the Gazetted Officer or the Magistrate, then only he should be searched. In the present case, through the mouth of the police officers who are examined as prosecution witnesses, evidence is tried to be led before the Court that the accused was informed and asked as to whether he wanted the search to be taken in the presence of a Gazetted Officer or a Magistrate.'

(16) As referred to above and re-mentioned at the risk of repetition, it is not known as to what was the secret information received and the accused had not been told as to why he has been detained and his person is to be searched. A valuable right which could be exercised by the accused thus was lost and he could not exercise his option to be taken before a Gazetted Officer or a Magistrate. It may, therefore, be held that prejudice was caused to the accused.

(17) Even with respect to the alleged recovery of the charas from the person of the accused, the evidence is not satisfactory so as to establish the recovery of charas beyond all reasonable doubts. Partap Singh, PW-2, is the solitary public witness. The statement made by him in his own words as recorded by the learned Trial Court, reads:

'ON 19.7.90 I was taking tea at the shop of Teka Ram at the shop situated at Suthrishah Mandir, Jamna Bazar. Three constable and one A.S.I. surrounded one person and asked him that they wanted to take search of him and that person replied to the police that if they wanted they could search him. That fellow is accused present in the court. After sometime Sho also arrived on the spot. Accused was told before hand that he could be searched before Senior Officer but the accused replied in negative. Thereafter accused was searched by A.S.I. Om Parkash and on his personal search charas wrapped in polythene was recovered from the right hand side pocket of the pants of the accused. Sample weighing of 6 gms was separated and sealed and sample and remaining charas were sealed by the Sho separately in two packets.

(18) His statement is very much different from what the official witnesses disclosed. Partap Singh state that Inspector Chander Mohan, PW-1, had arrived after the appellant was apprehended. This is totally contrary to the case of the prosecution and the evidence of the official witnesses. On the contrary, they state that Inspector Chander Mohan had arrived after secret information had been received. He knocks the bottom of the prosecution case further by stating that sample was taken of 6 gms while 10 gms is alleged to have been taken as sample and sent to Central Forensic Science baboratory. When the solitary public witness shakes the case of the prosecution, in the peculiar tact's of the present case, it become difficult to pin faith in the testimonies of the official witnesses.

(19) As a result of these reasons given above, it must be held that prosecution has failed to prove its case beyond all reasonable doubts. I, thereforee, accept this appeal and set aside the conviction and the order of sentence of the appellant. He be set at liberty, if not required in any other case.

(20) A copy of this order be sent to the appellant through Superintendent(Jail).