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Court : Delhi

Decided On : Feb-29-2000

Reported in : 2000IIIAD(Delhi)850; 2000CriLJ2645

Judge : M.S.A. Siddiqui, J.

Acts : Narcotic Drugs and Psychotropic Substances Act, 1985 - Sections 21 and 43; Code of Criminal Procedure (CrPC) , 1973 - Sections 100(4) and 161

Appeal No. : Crl.A. 169/97

Appellant : Chand Khan

Respondent : State

Advocate for Def. : Mr. M.S. Butalia, Adv.

Advocate for Pet/Ap. : Mr. R.D. Aggarwal and; Mr. Inderjeet Sharma, Advs

Judgement :
ORDER

M.S.A. Siddiqui, J.

1. This appeal is directed against the judgment and order of conviction dated 30.01.1997 passed by the Additional Sessions Judge, New Delhi in Sessions case No. 14/96 convicting the petitioner under Section 21 of the Narcotic Drugs and

Psychotropic Substances Act (for short the 'Act') and sentencing him to undergo rigorous imprisonment for ten years and to pay fine of rupees one lac or in default to suffer further simple imprisonment for two months.

2. Briefly stated the prosecution case is that on 3.11.1996 a police party led by Inspector S.P. Kaushik (P.W. 5), upon secret information received, apprehended the appellant in Hanuman Lane, Baba Khadak Singh Marg, New Delhi. The appellant was given the option of being searched before a Gazetted Officer or a Magistrate but he declined the offer. At that time the appellant was holding a polythene bag in his right hand. On search, the said bag was found to contain 855 gms. of heroin which was seized vide seizure memo (Ex. PW-4/8). The appellant was charged with an offence punishable under Section 21 of the Act and tried.

3. The learned Sessions Judge, on an assessment of the evidence adduced by the prosecution, accepted the prosecution case and convicted and sentenced the appellant as indicated above.

4. The question for consideration is whether on 3.11.1996, the contraband was recovered from the appellant's possession in accordance with the provisions of the Act. The prosecution case pertaining to recovery of the contraband revolves around the evidence of Inspector S.P. Kaushik (P.W. 5), S.I. Prem Chand (P.W. 8), Head Constable Rajinder Singh (P.W. 7), constable Reet Mahinder, constable Raj Kumar and A.S.I. Sahib Singh (P.W. 4). Inspector S.P. Kaushik (P.W. 5) testified that on 3.11.1996 he received a secret information about presence of a person in DIZ area, Baba Khadak Singh Marg having smack in his possession. He reduced the said information into writing vide DD entry (Ex.P.W. 5/4) after giving due intimation to the D.C.P. Narcotics. Thereafter, he organized a raiding party comprising of Sub Inspector Prem Chand (P.W. 8), Assistant Sub Inspector Sahib Singh (PW-4), Head Constable Rajinder Singh (P.W. 7) and Constables Reet Mahinder and Raj Kumar. Public witnesses were approached but they declined to join the raiding party. However at 11.40 A.M. the appellant was nabbed on being pointed out by the informer. At that time the appellant was holding a polythene bag in his right hand. He was given the option (Ex. P.W. 4/A) for being searched in the presence of Gazetted Officer or a Magistrate and on his declining, he was

searched and the said bag was found to contain 855 grams. of heroin which was seized vide Seizure Memo (Ex. P.W. 4/B). Samples were taken out from the Seized heroin. The samples and the remaining heroin were converted into separate parcels, which were sealed on the spot. The CFSL form was also filled in at the spot. The rukka (Ex.P.W. 5/A) was prepared at the spot and the same was sent to the police station on the basis of which the FIR (Ex. P.W. 6/A) was registered.

5. It has also come in the evidence of Inspector S.P. Kaushik (P.W. 5) that on the same day the appellant's house was also searched and one bottle containing some Chemical and polythene bags (Ex. P.W.2 & 3) containing brown powder used for manufacturing heroin were seized vide seizure memo (Ex. P.W. 4/D). He further testified that at 5.50 p.m. they came at the police station and deposited the sealed property along with CFSL form in the police malkhana vide entry (Ex. P.W. 5/D). The prosecution witnesses Sub Inspector Prem Chand (P.W. 2) and ASI Sahib Singh (P.W. 4) have supported the said version of Inspector S.P. Kaushik (P.W.5).

6. Learned counsel for the appellant contended that the Inspector S.P. Kaushik (P.W.5) had deliberately contravened the provisions of sub-Section (4) of Section 100 Cr. P. C. inasuch as no independent witness was associated to witness the all together search and Seizure. He further contended that Head Constable Rajinder Singh (P.W. 7) who was one of the members of the raiding party has not supported the prosecution case and the evidence of Inspector S.P. Kaushik (P.W. 5) and ASI Sahib Singh (P.W. 4) is replete with contradictions and discrepancies, and the learned Additional Sessions Judge has committed an illegality in placing implicit reliance on their evidence without corroboration from independent sources.

7. In State of Punjab Vs . Baldev Singh, : 1999 CriLJ3672 , it was held that the provisions of the Code of Criminal Procedure relating to search, seizure or arrest apply to search, seizure and arrest under the Act also to the extent they are not inconsistent with the provisions of the Act. Thus, while conducting search and seizure, in addition to the safeguards provided under the Act, the safeguards provided under the Code of Criminal Procedure are also required to be followed. It

is well settled that failure to comply with the provisions of the Code of Criminal Procedure in respect of search and seizure and particularly those of Sections 100, 102, 103 and 165 of the Code of Criminal Procedure per se does not vitiate the trial under the Act. But it has to be borne in mind that conducting a search and seizure in violation of statutory safeguards would be vocative of the reasonable, fair and just procedure. In Maneka Gandhi Vs . Union of India, : [1978]2SCR621 , it was held that when a statue itself provides for a reasonable, fair and just procedure, it must be honoured. Thus, an accused has the right to a reasonable, fair and just procedure. The statutory provisions embodied in Sections 41 to 55 and Section 57 of the Act and Sections 100, 102, 103 and 165 of the Code of Criminal Procedure provide for a reasonable, fair and just procedure.

8. Section 43 of the Act read along with subSection (4) of Section 100 Cr. P.C. contemplates that search should , as far as practicable be made in the presence of two independent and respectable witnesses of the locality and if the designated officer fails to do so, the onus would be on the prosecution to establish that the association of such witnesses was not possible on the facts and circumstances of a particular case. The stringent minimum punishment prescribed by the Act clearly renders such a course imperative. Thus, the statutory desirability in the matter of search and seizure is that there should be two or more independent and respectable witnesses. The search the seatch before an independent witness would impart much more authenticity and credit worthiness to the search and seizure proceedings. It would also verily strengthen the prosecution case. The said safeguard is also intended to avoid criticism of arbitrary and highhanded action against authorised officers. In other words, the legislature in its wisdom considered it necessary to provide such a statutory safeguard to lend credibility to the procedure relating to search and seizure keeping in view the severe punishment prescribed in the Act. That being so, the authorized officer must follow the reasonable, fair and just procedure as envisaged by the statute scrupulously and the failure to do so must be viewed with suspicion. The legitimacy of judicial process may come under cloud if the Court is seen to condone acts of violation of statutory safeguard committed by the authorized officer during search and seizure operations and may also undermine respect of law. That cannot be permitted.

9. The evidence of the Inspector S.P. Kaushik (P.W. 5) reveals that Head Constable Rajinder Singh (P.W.7) was also one of the member of the raiding party and he hard witnessed the entire search and seizure operation. Head Constable Rajinder Singh (P.W. 7) has admitted in his evidencein-chief that he was in the said raiding party. Surprisingly he has nowhere stated that the appellant was apprehended at the spot and the contraband was seized from his possession in his presence as asserted by Inspector S.P. Kaushik (P.W. 5). Had he witnessed the alleged search and seizure, he would not have failed to depose about it. It seems inconceivable that being a member of the raiding party he would not have witnessed the alleged search and seizure. This is a very serious infirmity which destroys the credibility of the evidence of S.P. Kaushik (P.W. 5) , S.I. Prem Chand (P. W. 8) and ASI Sahib Singh (P.W. 4) regarding the alleged recovery of contraband from the appellant's possession. In this view of the matter, it would not be safe to accept the evidence of the said police officials without corroboration from independent sources. It is relevant to mention that constables Reet Mahinder and Raj Kumar were also members of the raiding party but they have not been produced in the witness box. The evidence of Inspector S. P. Kaushik (P.W. 5) reveals that the secret information was received at 11 A.M. and the police party came to the spot at 11.25 p.m. Thus there was sufficient time to procure attendance of public witnesses to witness the search and seizure. This is not a case where due to urgency of the matter or for any other reason it was not possible to comply with the provisions of sub section (4) of Section 100 for associating public witnesses during the course of search and seizure. It is also undisputed that the place where the appellant was nabbed was not a deserted place. Though, Inspector S.P. Kaushik (P.W. 5) SI Prem Chand and ASI Sahib Singh (P.W. 4) want us to believe that public witnesses were approached and they declined to join the raiding party, but their evidence is conspicuous by the absence of any description as to the persons who were asked to witness the search and seizure and whether they were called upon to do so by an order in writing. Reference may, in this context, be made to the provision of sub-Section (8) of Section 100 Cr. P.C., which provides that any person, who without reasonable cause, refuses or neglects to attend and witness a search under Section 100 of the Code, when called upon to do so by an order in writing delivered or tendered

to him, shall be deemed to have committed an offence under Section 187 IPC. In the instant case, there is nothing to indicate that Inspector S.P. Kaushik (PW-5) had served or even attempted to serve an order in writing upon any public witness as envisaged by sub-Section (8) of Section 100 Cr. P.C. In this connection, I may usefully except the following observations of Malik Shariefu Din, J, in Rattan Lal Vs . State : 32(1987)DLT1 :- '

'....In the case in hand the seizure and the arrest have been made under section 43 of NDPS Act. Admittedly, no pubic witness was involved in the matter of search and seizure as envisaged by sub-section (4) of section 100 Cr. P. C. The Explanationn offered is that public witnesses were requested but they declined to cooperate. My experience is that this Explanationn is now being offered in almost all cases. In the circumstances of a particular case it may so happen that for a variety of reasons public witnesses may decline to associate themselves but generally speaking it does not so happen. If a public witness declines to cooperate without reasonable cause inspire of an order in writing, to witness the seizure and search, he will be deemed to have commit ted an offence under section 187 I.P.C. and this has been clearly spelt out in sub-section (8) of Section 100 Cr. P.C. In the present case there is a vagure Explanationn that public witnesses were approached but they declined. Neither the name of such witness has been given nor has any order in writing to that effect been preserved, nor it is asserted that a mention about the same has been made in the case diary. Obviously, there is a deliberate attempt to defeat the legislative safeguards'.

10. Thus in the instant case it may safely be inferred that although public witnesses were available but no attempt was made by said police officers to associate them before searching the appellant. I am unable to find any reason as to why Inspector S.P. Kaushik (P.W. 5) did not even make an attempt to associate any independent witness or witnesses during the course of search and seizure operation. As already observed, the compliance with the procedural safeguards contained in the Code of Criminal Procedure are intended to serve dual purpose to protect person against false accusation and frivolous charges as also to lend credibility to the search and seizure conducted by the authorized officer. It has to borne in mind that where the error, irregularity or illegality touching the procedure

committed by the authorized officer is so patent and loudly obtrusive that it leaves on his evidence an indelible stamp of infirmity or vice which cannot be obliterated or cured, then it would be hazardous to place implicit reliance on it.

11. It is significant to mention that it has come in the evidence of Sub Inspector Prem Chand (P.W. 8) that on the same day at about 4 p.m. the appellant's house was also raided and searched by the police party. According to the evidence of Inspector S.P. Kaushik (P.W. 5) and Sub Inspector Prem Chand (P.W. 8) the police party returned back at the police station at about 5.50 p.m. ASI Sahib Singh (P.W. 4) has stated in his cross examination that his statement under Section 161 was recorded at 2 p.m. at Baba Khadak Singh Marg. Surprisingly the said statement mentions about recovery of certain articles during the search of the appellant's house. As per prosecution case the appellant's house was searched at 4 p.m. It is not at all understandable how this witness could have mentioned in his statement under Section 161 Cr. P. C. about seizure of the articles from the appellant's house as at that time no search of the appellant's house had taken place. ASI Sahib Singh (P.W. 4) has expressed his inability to offer any Explanationn whatsoever regarding the said discrepancy in his statement under Section 161 Cr. P.C. This circumstance casts serious reflection on veracity of prosecution case regarding recovery of the contraband from the appellant's possession.

12. There is another infirmity which has also shaken the foundation of the prosecution case to an irreparable extent. The rukka (Ex. P.W. 5/B) reveals that the alleged search and seizure was made at 11.40 A.M. and it was sent to the Police Station at 1.15 P.M. The FIR (Ex. P.W. 6/A) was registered at 1.35 p.m. The seizure memo (Ex. P.W.4/B), personal search memo of the appellant (Ex. P.W. 4/C) which were prepared on the spot immediately after seizure of the contraband, bear registration number of the FIR (Ex. P.W. 6/A) The number of the FIR (Ex. P.W. 6/A) given on the top of the aforesaid documents is in the same ink and in the same handwriting which clearly indicates that all these documents were prepared at the same time. The prosecution has not offered any Explanationn as to under what circumstances number of the FIR (Ex. PW-7/A) had appeared on the top of these documents. This gives rise to two inferences that either the FIR

(Ex. PW-7/A) was registered prior to the alleged recovery of the contraband or that number of the FIR was inserted in these documents after its registration. In both the situations, it seriously reflects upon the veracity of the prosecution case and robs the efficacy of the evidence of the aforesaid police officials regarding the alleged recovery of contraband from the appellant's possession. Viewing the aforesaid circumstances, I find it unsafe to place implicit reliance upon the testimony of the said Police Officials without corroboration from independent sources. No such corroboration is coming forth in this case.

13. Thus, the network constituted by the circumstances mentioned above leaves a gap of varied dimensions through which the appellant can get out with equal facility. Unfortunately, the learned Additional Sessions Judge did not take notice of the aforesaid infirmities in the prosecution case and unjustifiably accepted the prosecution evidence. Consequently, the impugned order of conviction and sentence cannot be sustained in law.

14. In the result, the appeal is allowed. The impugned judgment, the order of conviction and sentence are set aside and the appellant is acquitted of the offence charged under Section 21 of the Act. The appellant is in custody. He be set at liberty immediately, if not wanted in any other case. Fine, if paid, shall be refunded to the appellant.