

Mohd. Raffique Vs. State

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Court : Delhi

Decided On : Feb-29-2000

Reported in : 2000IIIAD(Delhi)861; 2000CriLJ2401

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

Acts : Narcotic Drugs and Psychotropic Substance Act, 1985 - Sections 21

Appeal No. : Crl. A. No. 216/99

Appellant : Mohd. Raffique

Respondent : State

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

Advocate for Pet/Ap. : Mr. K.K. Dutta, Adv

Judgement :

ORDER

M.S.A. Siddiqui, J.

1. This appeal is directed against the judgment and the order dated 20.4.99 passed by the Additional Sessions Judge, Delhi in Sessions Case No. 118/95 convicting the appellant under Section 21 of the Narcotic Drugs and Psychotropic Substances Act (for short the 'Act') and sentencing him to undergo rigorous

imprisonment for 10 years and to pay fine of Rs. 1 lakhs or in default to suffer further rigorous imprisonment for one year.

2. Briefly stated, the prosecution case is that on 1st April, 1995 at 9.45 A.M. a police party led by Sub Inspector Satpal (P.W. 6), upon information received, apprehended the appellant in the Gali Masjid Wali, Mohalla Shahganj Delhi. The appellant was given the option (Ex. P.W. 3/8) of being searched before a Gazetted Officer or a Magistrate. He declined the offer. Thereupon SHO P.L. Puri (P.W. 2), directed the Constable Jamil Ahmad (P.W. 4) to search the appellant. Pursuant to the said direction, Constable Jamil Ahmad (P.W. 4) searched the appellant and recovered one packet containing 5 gms. of heroin from right side pocket of his Kurta. The contraband was seized vide recovery memo (Ex. P.W. 2/A). The appellant was charged with an offence punishable under Section 21 of the Act and tried.

3. The appellant abjured his guilt and alleged that a false case has been foisted on him. He has examined Mohd. Nafeez (D.W. 1) and Mohd. Shabir (P.W. 2) in support of his defense. Learned Additional Sessions Judge, on an assessment of the evidence on record, accepted the prosecution case and convicted and sentenced the appellant as indicated above.

4. The question for consideration is whether on 1st April, 1995 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 P.L. Puri (P.W. 2), Constable Sukhram Pal (P.W.

3) Constable Jamil Ahmad (P.W.

4) and Sub Inspector Satpal (P.W. 6). S.I. Satpal Singh (P.W.

6) deposed that on 1st April, 1995, while he was on petrol duty he received a secret information that one person was selling smack in Gali Masjid Wali Mohalla Shahganj. The information was received at 9.35 A.M. and the same was reduced into writing (Ex. P.W. 3/A). Thereafter he organized a raiding party consisting of Constable Jamil Ahmad (P.W.

4) and Constable Sukhram Pal (P.W. 3). Public witnesses were approached but they declined to join the raiding party. However, the raiding party came to the spot namely Gali Masid Wali at 9.45 A.M. and the appellant was napped on being pointed out by the informer. SHO P.L. Puri (P.W. 2), on receiving the telephonic message about arrest of the appellant, came to the spot. Notice under Section 50 of the Act (Ex. P.W. 3/B) was served on the appellant but he declined the offer of being searched before a Gazetted Officer or a Magistrate. On his declining SHO P.L. Puri (P.W.

2) directed the Constable Jamil Ahmad (P.W.

4) to search the appellant. Pursuant to the said direction, Constable Jamil Ahmad (P.W.

4) searched the appellant and recovered one packet containing 5 gms. of smack from the right side pocket of his Kurta, which was seized vide seizure memo (Ex. P.W. 2/A). A sample of one gram. was taken out and the sample and the remaining smack were converted into two separate parcels, which were duly sealed. The CFSL form was filled in at the spot. The rukka (Ex. P.W. 1/A) was prepared at the spot and the case property along with CFSL form and the rukka (Ex. P.W. 1/A) were sent to the police station. The prosecution witnesses, namely, SHO P.L. Puri (P.W. 3), Constable Sukhram Pal (P.W.

3) and Constable Jamil Ahmad (P.W.

4) have supported the said version of Sub Inspector Satpal (P.W. 6).

5. Learned counsel for the appellant contended that the sub-Inspector Satpal (P.W. 6) and SHO P.L. Puri (P.W. 3) had deliberately violated the provisions of sub-Section (4) of Section 100 Cr. P.C. inasmuch as no independent witness was associated to witness the alleged search and seizure and the learned Additional Sessions Judge has committed an illegality in placing implicit reliance on their evidence without corroboration from independent sources.

6. 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 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 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 violative of the reasonable, fair and just procedure. In *Maneka Gandhi Vs . Union of India*, : [1978]2SCR621 , it was held that when a statute 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.

7. Section 50 of the Act read along with sub-Section (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 before an independent witness would impart much more authenticity and credit worthiness to the search and seizure proceedings. It would also verify strengthen the prosecution case. The said safeguard to 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 safeguards committed by the authorized officer during search and seizure operations and may also undermine respect of law. That cannot be permitted.

8. It is undisputed that no public witness was associated during the course of search and seizure proceedings and the prosecution case hinges solely on the testimony of police officials. As per prosecution case the secret information was received at 9.35 A.M. and the appellant was apprehended at about 10 A.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 witness during the course of search and seizure. It is also undisputed that the appellant was apprehended in Gali Masjid Wali, which is a thickly populated area. Prosecution witnesses SHO P.L. Puri (P.W. 2) Constable Sukhram Pal (P.W. 3), Constable Jamil Ahmad (P.W. 4) and SI Satpal (P.W. 6) want us to believe that at the relevant time public witnesses were approached but they declined to join the raiding party.

9. It is worth mentioning that the evidence of the said police officials is conspicuous by the absence of any description as to who were 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 the authorized officer 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 excerpt the following observations of Malik Sharief-u 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 public 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 co-operate without reasonable cause inspire of an order in writing, to witness the seizure and search, he will be deemed to have committed 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 vague 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. It has come in the evidence of Sub Inspector Satpal (P.W. 6), Constable Jamil Ahmad (P.W. 4) and Constable Sukhram Pal (P.W. 3) that Gali Masjid Wali is a thickly populated area. It seems inconceivable that no one from the public had come to the spot to witness the alleged search and seizure operation. Having regard to the area and the place of search and seizure, it appears that public witnesses were available but no serious attempt was made by Sub Inspector Satpal (P.W. 6) to associate them before searching the appellant. I am unable to find any reason as to why he did not even make any attempt to associate any independent witness or witnesses during the course of search and seizure operation.

11. As stated earlier, the compliance with the procedural safeguards contained in the Code of Criminal Procedure and the Act are intended to serve dual purpose to protect a 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. The aforesaid circumstances make the court to be circumspect and look for corroboration of the testimony of the said police officials from independent sources. No such corroboration is coming forth in this case.

12. There is another infirmity which has shaken the foundation of the prosecution case to an irreparable extent. It has come in the evidence of SHO P.L. Puri (P.W. 3), Constable Sukhram Pal (P.W. 3), Constable Jamil Ahmad (P.W. 4) and SI Satpal (P.W. 6) that the notice under Section 50 of the Act (Ex. P.W. 3/B) was given to the appellant before taking his personal search. Thus, the said notice must have been followed by the personal search of the appellant. The appellant's personal search memo (Ex. P.W. 3/C) recites that one driving licence, currency notes worth Rs 20/- and a key ring containing keys were recovered from the personal search of the appellant. The personal search memo (Ex. P.W. 3/C) is conspicuous by the absence of the factum of the alleged recovery of contraband from the appellant's possession. On the contrary the seizure memo (Ex. P.W. 2/A) reveals that the contraband was recovered from the right side pocket of the appellant's kurta. If the contraband has been recovered from the person of the appellant it would have been mentioned in the personal search Memo (Ex. P.W. 3/C). Thus the omission in the appellant's personal search Memo (Ex. P.W. 3/C) regarding recovery of the contraband from the person of the appellant is a very serious infirmity which destroys the credibility of the evidence of said police officials. 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.

13. It is worth mentioning that PW Satpal Singh (PW-6) has stated in his cross-examination that appellant's personal search memo (Ex. PW-3/C) was prepared after registration of the FIR (Ex. PW-1/8). Why the preparation of appellant's personal search was deferred till registration of the FIR (Ex. PW-1/B) is shrouded in mystery. That apart, SI Satpal Singh (PW-6) has further stated in his cross-

examination that 'At present, I do not remember of what articles were recovered from personal search of the accused.' In view of the said statement, it would be highly unsafe to rely upon his earlier statement recording recovery of the contraband from the appellant's possession.

14. 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.

15. 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.