Vijay Kumar Vs. State

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Court : Delhi

Decided On : Feb-14-1995

Reported in : 1995(2)ALT(Cri)23; 1995CriLJ2599; 1995(32)DRJ671

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

Acts : Narcotic Drugs and Psychotropic Substances Act, 1985 - Sections 20

Appeal No. : Criminal Appeal No. 64 of 1992

Appellant : Vijay Kumar

Respondent : State

Advocate for Pet/Ap. : Rajeev Awasthi and; P.S. Sharma, Advs

Judgement :

M.S.A. Siddiqui, J.

(1) The appellant Vijay alias Hanuman was convicted by the Additional Sessions Judge, New Delhi under Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as 'the Act') and sentenced to undergo rigorous imprisonment for a period of 10 years and to pay a fine of Rs. one lac in default of payment of which to undergo fur- ther R.I. for two years for being in illegal and unauthorised possession of 41 grams of charas.

(2) Briefly stated, the prosecution case is that on 8.4.90 at about 8.30 p.m., while A.S.I. Hazari Lal (P.W.3), was on patrol duty along with Constable Kirpal Singh and Kanihya Lal, received a secret information to the effect that one person was selling charas near B-Block, Raghubir Nagar. Acting upon this information, a raiding party was organized. Since public persons refused to join the raiding party, A.S.I. Hazari Lal (P.W.3) accompanied by Constables Kanhiya Lal (P.W.5) and Kirpal Singh (P.W.2) proceeded to B-III Block Raghubir Nagar and apprehended the appellant. Immediately thereafter Constable Kirpal Singh (P.W.2) went to inform S.H.O. Rajinder Singh (P.W.6) over phone. On the information received at about 9.05 p.m. S.H.O. (P.W.6) arrived at the spot. On reaching the spot, S.H.O. Rajindra Singh made an offer to the appellant that if he desired his search could be carried out in presence of a Gazetted Officer or a Magistrate but the apellant declined the offer. Then on the direction of the S.H.O., A.S.I. Hazari Lal (P.W.3) took search of the appellant and recovered 41 grams of charas from his possession vide seizure memo Ex.P.W.4/A. Sample of the seized charas was taken. The sample as well as the remaining charas were converted into separate packets and they were duly sealed. The case was registered against the appellant and the case property was deposited in the Malkhana. The sampled charas was sent to the Central Forensic Science Laboratory and on receipt of the report of Shri V.S. Bisaria, Senior Scientific Officer, C.F.S.L. showing that the sample was of charas, the appellant was charge sheeted under Section 20 of the Act.

(3) The appellant abjured his guilt and alleged that a false case has been foisted on him. He has examined Shanti (D.W.I) and Rajesh (D.W.2) in support of his defense. aa Learned trial court accepted the prosecution case and convicted the appellant.

(4) The main contention advanced on behalf of the appellant is that the Lower Court failed to appreciate the inherent infirmities in the prosecution evidence and that there is no legal evidence on record to support the finding that on the day in question the appellant was found in possession of the contraband.

(5) The first point to be determined in the appeal is whether the substance seized and produced in this case was charas. In order to prove the said fact, the

prosecution has relied on the report of the C.F.S.L. (Ex.P.W.3/B) which gave positive test for charas. This report has been assailed by the appellant on the ground of its inadmissibility in evidence under Section 293 Criminal Procedure Code . Admittedly, this report is not by a Director or Deputy Director or Assistant Director of Forensic Science Laboratory as contemplated by Section 293 of the Code of Criminal Procedure. Perusal of the said report shows that the same has been made by Shri V-.S. Bisaria, Sr. Scientific Officer, Central Forensic Laboratory, Central Bureau of Investigation. Section 293 Cr.P.C. reads as follows:-

'REPORTS of Certain Government Scientific Experts: 1) Any document purporting to be a report under the hand of a Government scientific expert to whom this section applies, upon any matter or thing duly submitted to him for examination or analysis and report in the course of any proceeding under this Code, may be used as evidence in any inquiry, trial or other proceeding under this Code. 2) The Court may, if it thinks fit, summon and examine any such expert as to the subject-matter of this report. 3) Where any such expert is summoned by a Court and he is unable to attend personally, he may, unless the Court has expressly directed him to appear personally, depute any responsible officer working with him to attend the Court if such officer is conversant with the facts of the case and can satisfactorily depose in Court on this behalf. 4) This section applies to the following Government scientific experts, namelv:- a) any Chemical Examiner or Assistant Chemical Examiner to Government; b) the Chief Inspector of Explosives; c) the Director of the Finger Print Bureau; d) the pirector, Haffkeine Institute, Bombay; e) the Director (Deputy Director or Assistant Director) of a Central Forensic Science Laboratory or a State Forensic Science Laboratory; f) the Serologist to the Government.

(6) It has not been disputed before me that Sr. Scientific Officer, Central Forensic Science Laboratory does not fall in categories of the experts mentioned in Section 293 ibid. Shri V.S. Bisaria has not been examined in this case. Learned counsel for the appellant relying upon decisions rendered in Heera Lal v. State 52 (1993) DLT, Islam v. The State (Delhi Administration) 1994 (30) D.R.f. 629 , Attar Singh Vs . State (Delhi Administration) : 1994IIIAD(Delhi)625 , contended that the said report not being under the hand of a Scientific expert mentioned in Sub-Section

4(c) of Section 239 Cr.P.C. cannot be used as evidence in trial without the same being examined in this case. It has been held in these judgments that the report of Sr: Scientific 0fficer, Central Forensic Science Laboratory can't be used in evidence as he does not fall in the categories of the experts mentioned in Section 293 Cr.P.C. After these decisions, a contrary view was taken by a learned single Judge of this court in the decision rendered in Shankaria @ Shanker Vs . The State : 56(1994)DLT662 and it was laid down that question of proof of a document is a question of procedure and may be waived. According to the learned Judge, when a relevant document is tendered and admitted in evidence without objection to its admissibility or mode of proof, the appellant can't be allowed to challenge its inadmissibility in appeal. This view is based upon the well established principle of law that the rules as regards the production of a document and strict proof thereof, as contained in the Evidence Act, can be dispensed with by consent of the parties and once a relevant document is admitted in evidence without any objection to its mode of proof, its admissibility can't be challenged in appeal.

(7) In the instant case, the question is whether the rules of evidence as regards the production and strict proof of a document can be waived in a criminal case. Kenny answers this question in negative. He states that:

'A marked distinction between the civil and the criminal views of the law of evidence is that its rules may in civil cases be waived, either by consent or by an order made on a summons for directions- but in criminal case the rules of evidence are matters public Jurisdiction, and can't be dispensed with by consent of parties. For, here, others than they have an interest at stake. Not merely the single person accused, but also every other inhabitant of the realm, has an interest in seeing that the prisoner's liberty or life is not taken away except under the whole of the safeguards which the law has prescribed.....'

(Quoted from Keny's outlines of Criminal Law, 1971 Edition at page 472)

(8) It has been held in Koli Trikarn Jivraj & another Vs . The State of Gujarat : AIR1969 Guj69 ,

'THAT in a criminal case a lawyer appears to defend the accused and has no implied authority to make admissions against his client during the progress of litigation either torn the purpose of dispensing with proof at the trial or incidently as to any facts of the case. See Phipson's Manual of Evidence, 8th Edition at page 134. It is therfore, evident that the role that a defense lawyer plays in a criminal case is that of assisting the accused in defending the case. The lawyer has no implied authority to admit the guilt or facts incriminating the accused.'

(9) I may add here that the-question posed by me in this case was not raised and considered in Shankaria's case (supra) and the view taken by the learned Judge has been approved by a recent decision rendered by the Davison Bench of this court in Amarjit Singh & Another v. State 1995 (32) Drj : Crl.Appeal No.91/92 decided on 2.12.1994. In view of the dictum laid down by the said Divison Bench, I have no option but to hold that the report (Ex.P.W-3/B) of Shri V.S. Bisaria was tendered and admitted in evidence without objection as to its inadmissibility or mode' of proof, the appellant can't be allowed to challenge its inadmissibility in this appeal. Thus, the report (Ex.PW.3/B) clearly proves that the substance seized and produced in this case was charas.

(10) The learned counsel for the appellant has strenuously urged before me that it was not safe to act upon the testimony of police official inasmuch as certain mandatory provisions of the Act have not been complied with. According to the learned counsel, it was incumbent upon the police officer (P.W.3) receiving the secret information to incorporate the same in the Daily Diary and in the present case failure of the said officer to have not done so, should render the conviction of the appellant wholly unsustainable on the ground of non-compliance of the mandatory provisions of Section 42 of the Act. Inevitably, the issue here has to run around the language of the Statute, and, thereforee, the provisions of the relevant part of Section 42 of the Act may be read at the outset. Section 42 reads as follows: .

'SECTION 42: Power of entry, search, seizure and arrest without warrant or authorisation - (1) Any such officer (being an officer superior in rank to a peon, sepoy or constable) of the departments of central excise, narcotics, customs,

revenue intelligence or any other department of the Central Government or of the Border Security Force as is empowered in this behalf by general or special order by the Central Government, or any such officer (being an officer superior in rank to a peon, sepoy or constable) of the revenue, drugs control, excise, police or any other department of a State Government as is empowered in this behalf by general or special order of the State Government, if he has reason to believe from personal knowledge or information given by any person and taken down in writing, that any narcotic drug, or psychotropic substance, in respect of which an offence punishable under Chapter Iv has been committed or any document or other article which may furnish evidence of the commission of such offence is kept or concealed in any building, conveyance^ or enclosed place, may, between sunrise and sunset - a) enter into and search any such building, conveyance or place; b) in case of resistance, break open any door and remove any obstacle to such entry; c) seize such drug or substance and all materials used in the manufacture thereof and any other article and any animal or conveyance which he has reason to believe to be liable to confiscation under this Act and any document or other article which he has reason to believe may furnish evidence of the commission of any offence punishable under Chapter Iv relating to such drug or substance; and d) detain and search, and, if he thinks proper, arrest any person, whom he has reason to believe to have committed any offence punishable under Chapter Iv relating to such drug or substance; Provided that if such officer has reason to believe that a search warrant or authorisation cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place at any time between sunset and sunrise after recording the grounds of his belief. 2) Where an officer takes down any information in writing under sub-section (1) or records grounds for his belief under the proviso thereto, he shall forthwith send a copy thereof to his immediate official superior.'

(11) It is well settled that the provisions of Section 42 of the Act are mandatory and contravention of the same would affect the prosecution case and vitiate the trial. (State of Punjab Vs . Balbir Singh : 1994 CriLJ3702): It is worth mentioning here that under Section 42 of the Act, the empowered officer even without a warrant issued as provided under Section 41, will have the power to-enter, search, seize

and arrest between sunrise and sunset if he has reason to believe from personal knowledge or information given by any other person and taken down in writing that an offence under Chapter Iv of the Act has been committed or any document or other article which may furnish the evidence of the commission of such offence is kept or concealed in any binding, conveyance or enclosed place. This section does not lay down that if the personal search of any suspected person is carried-out at a public place, the empowered officer is bound to reduce into writing the secret information received by him.

(12) In State of Punjab v. Balbir Singh (supra), the Apex Court considering the scope of Sections 41,42 and Section 43 of the Code observed that :-

'AS already noted Chapter V contains the provisions from Section 41 onwards regarding the power to arrest, issue warrants and carrying out seizure etc. and the procedure to be followed. These provisions are attracted if any of the steps mentioned there under are to be taken when there is reason to believe that any person who is sought to be arrested and searched, has committed any offence punishable under Chapter Iv of the Act. The Magistrate or Officers especially empowered under the Act can proceed under Sections 41 and 42 on -the prior information and/or having reason to believe thereupon that an offence under the Act has been committed. We may mention here that Section 43 which deals with the power of seizure and arrest in public places is slightly different from Section 42 in certain respects. Under this provision any empowered officer under Section 42 has the power to seize, detain, search or arrest in public place or in transit if he has reason to believe that an offence punishable under Chapter Iv relating to such drug or substance has been committed and seize any document or other article which may furnish evidence of the commission of such offence and can seize any animal or conveyance or article liable to confiscation and can detain and search any person similarly. The empowered officer while acting under Section 43 need not record any reasons of his belief. This Section also does not mention anything about the empowered officer having prior information given by any person or about recording the same, as compared to Section 42.'

(13) It thereforee emerges that Section 42 of the Act is not applicable to a case where search has not been carried out in any building. Conveyance or enclosed place. In this case, the appellant's search has been carried out at a public place. Consequently, I have no hesitation in coming to the conclusion that the provisions of Section 42 of the Act are not applicable to the present case.

(14) Learned counsel for the appellant vehemently contended that the appellant's search had not been carried out in the presence of two independent and respectable witnesses and this lapse on the part of the investigating officer vitiates both search and recovery and the appellant is entitled to get himself acquitted on this ground alone. In my opinion, this submission of the learned counsel does not hold much water. If the investigating officer fails to procure independent and respectable persons to witness the search then such search would not peruse be illegal and would not vitiate the trial. However, the .effect of such failure has to be borne in mind while appreciating the evidence in the facts and circumstances of each case. I have it from the lips of A.S.I. Hazari Lal (P.W.3), Constable Kirpal Singh (P.W.2), and Constable Kanihya Lal (P.W.5) that at the relevant time some public persons were requested to join the raiding party but they declined to join. One important thing to notice in connection with the cross examination of the said witnesses is that it was not even suggested to them that the investigating officer did not make any effort to procure independent witnesses at the time of the alleged search. Thus it is evident from the testimony of the said witnesses that efforts were made to join some passers-by but on their refusal A.S.I. Hazarilal (P.W.3) had no option but to apprehend the appellant. The investigating officer was not supposed to have forcibly detained the passers-by who had declined to join in the raid. In Santokh Singh v. State 1990(1) C.C. Cas, it was observed that normally whenever any recovery is to be effected by the police, the police should join public witnesses to ensure that the investigation being done by the police is fair but it can't be laid down as a broad proposition of law that if two public witnesses are not joined for any reason whatsoever the recovery affected by the police should be held to be doubtful.

(15) It is evident from the testimony of the aforesaid prosecution witnesses that association of public witnesses at the time of the alleged search was not possible

on the facts and circumstances of the present case. A.S.I. Hazari Lal (P.W.3), materially corroborated by S.H.O. Rajinder Singh (P.W.6) Constable Kanihya Lal (P.-W.5) and Constable Kirpal Singh (P.W.2), testified that after apprehending the appellant, S.H.O. (P.W.6) was informed over phone. Their evidence further shows that on the information received at about 9.05 p.m., S.H.O. (P.W.6) arrived on the spot, that the appellant was apprised of his statutory right to get his search effected in the presence of a Gazetted Officer or a Magistrate but the appellant declined the offer and that on the appellant's declining the said offer, the contraband article was recovered from his possession vide seizure memo Ex.P.W.4/A. On these points, their testimony also finds ample corroboration from the F.I.R. (Ex.P.W.1/B). Nothing has been elicited in the cross-examination of the said witnesses to show that they had any axe to grind against the appellant. It 'is well settled that the testimony of a witness is not to be doubted or discarded merely on the ground that he happens to be an official but as a rule of caution and depending upon the circumstances of the case, the courts look for independent corroboration. In the present case, testimony of the said prosecution witnesses have been believed by the learned trial judge and, I am hot inclined to take a different view. Thus, the evidence on record clearly proves that the mandatory provisions of Section 50 of the Act were duly complied with by the S.H.O. Rajinder Singh (P.W.6). '.

(16) No other point has been urged before me. For the reasons discussed above, I maintain the conviction and sentence of the appellant and dismiss the appeal.