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SooperKanoon Citation : sooperkanoon.com/703903

Court : Delhi

Decided On : Mar-26-1996

Reported in : 1996CriLJ3649; 1996(37)DRJ301

Judge : Usha Mehra, J.

Acts : Narcotic Drugs and Psychotropic Substances Act, 1985 - Sections 50

Appeal No. : Criminal Appeal No. 93 of 1995

Appellant : John Bamidele

Respondent : State

Advocate for Pet/Ap. : S.K. Agarwal,; Jatinder Sarin and; Anil Soni, Advs

Judgement :

Usha Mehra, J.

(1) The appellant, a Nigerian citizen was apprehended on 19th February,1989 while coming towards Chanakya Hotel. As per prosecution story, a secret information was received by SI.Harbans Lal that appellant would be coming towards Chanakya Hotel. He would be having smack in his possession. On this information being received, S.I. Harbans Lal (Public Witness -7) Investigating Officer (in short 1.0.) of this Case organized a raiding party comprising ofA.C.P' S.H.O., Sub Inspector and two public witnesses namely Surender Kumar, owner of

Chanakya Hotel and Kuldeep Grover, Manager of the said Hotel. At the time of appellant's apprehension he was having a bag in his hand. He was asked as to what that bag contained. After making this enquiry the Acp introduced himself to the appellant and told him that the appellant and his bag has to be searched. A.C.P. gave option to the appellant to be searched before the Magistrate or Gazetted Officer. However, the appellant declined the offer. From the search of the appellant, 150 baloon like capsules were recovered containing 700 gms. of smack. Out of which 10 gms. was taken out as sample for analysis. The remaining smack was converted into Pullanda. The pullanda and the sample were sealed with the seal of Hl and TR. Cfsl form was also filled at the spot. The case property and the sample Along with Cfsl form were deposited in the Malkhana of the Police Station. The analysis report was in the affirmative hence challan against the appellant was put up.

(2) Prosecution examined members of the raiding party as witnesses. Trial Court vide impugned order convicted and sentenced the appellant for 10 years Rigorous Imprisonment and fine of Rs.l lac. Failing to deposit the fine further undergo Simple Imprisonment for two months.

(3) The impugned order has been assailed on the grounds that there was a violation of the mandatory provisions of Section 50 of the Narcotic Drugs and Psychotropic Substances Act (in short the Act). Section 50 of the Act requires that an option has to be given to the accused to be searched before the Gazetted Officer or the Magistrate. It is only when he expresses the desire to be searched before either of these two authorities that the 1.0. will take him to the nearest Gazetted Officer or the Magistrate as the case may be. Mr.Jatinder Sarin, counsel for the appellant contended that the A.C.P. Sh.P.S.Tomar member of the raiding party appearing as PW-4 has tried to improve his statement in the Court. In fact he only disclosed his identity to the accused as A.C.P. He never told him that he was a Gazetted Officer. Only option given to the appellant was whether he would like to be searched before a Magistrate. Moreover, appellant being a Nigerian citizen did not know English hence there was no question of the appellant declining the option of search before the Magistrate or Gazetted Officer in English language. Mr.Jitender Sarin further contended that this part of (Public Witness .4)

Sh.P.S.Tomar's statement is an improvement of his statement recorded under Section 161 Cr.P.C. thereforee, this part of his testimony cannot be relied upon. Even otherwise the testimony of A.C.P. (Public Witness -4) cannot be relied because it is contrary to what happened .at the spot. Rukka Ex.PW-7/C executed at the spot does not support the version now given by the A.C.P. (Public Witness -4). The appellant being a Nigerian citizen could not understand that A.C.P. is a Gazetted Officer. The option to search before a Metropolitan Magistrate was given which being a partial offer there is violation of mandatory provisions of the Act hence prosecution must fail on this ground alone. To lay stress to this point that it was only partial offer Mr.Sarin placed reliance on the wording used in the Rukka prepared at the spot and Exhibited as Ex.PW-7/C. In the said Rukka, Ex.PW-7/C it has been admited that accused was given only one option. The relevant lines of the Rukka Ex.PW-7/C are reproduced as under :-

ACPSH. P.S.TOMAR Ne Apna Pad Batlate Huay Muljim Se Kaha Ki Uske Paas Heroin (SMACK) Hone Ki Itla HAI. Wah Agar Apni Talashi Wa Bag Jo Uske Paas Hai Uski Talashi M.M. Saheb Ke Saamne Dena Chahta Hai To De Sakta HAI. (Means Acp Shri P.S.Tomar while telling about his status told the accused that he had information that he was in possession of heroin (smack). If he wants he and his bag which he was carrying could be searched before the M.M.)

(4) Laying stress on these lines Mr.Sarin contended that the testimony of Mr.Tomar PW-4 that he introduced himself as Gazetted Officer is belied from the reading of Rukka Ex.PW-7/C'. Complete option as required under Section 50 of the Act having not been given hence there was violation of statutory provision of the Act. This further proves that A.C.P. Shri P.S.Tomar (Public Witness -4) tried to improve his statement in order to fill up the lacunae. Since partial offer was given, thereforee, there was no question of the accused declining the option. Merely disclosing himself to be A.C.P., by no stretch of imagination would mean that accused understood that A.C.P. is a Gazetted Officer. Being a Nigerian citizen he could not have understood that the rank of A.C.P. is that of a (Jazeted Officer. Rukka Ex.PW-7/C executed at the site does not support the version of the A.C.P. or of the 1.0. Si Harbans Lal (Public Witness -7) 1.0. of the case admitted that only a partial option was given. According to him, the accused was given the option to

be searched before the Magistrate. The fact that the Acp described himself as Gazetted Officer has not been corroborated by any other witness.

(5) MR.JITENDER Sarin then drew the attention of this Court to various documents alleged to have been executed at the spot to indicate that none of those documents bear the signature of the A.C.P.. Had the A.C.P. been there his signature must have been there on those documents. Hence, it is apparent that A.C.P. was not present at the spot at that time. I am afraid this argument has no force. Merely because A.C.P. did not sign the documents, presumption cannot be drawn that he was not present or accused was not apprehended. In so far as the objection that appellant did not know English and, thereforee, could not have declined the option in English is also without substance. Statement of the accused was recorded in the Court under Section 313 Cr.P.C. He answered all the questions in English though he tried to explain it away by saying that he knew little English. The fact that he understood Court questions and answered shows that he must have understood the option given and declined after understanding the same. The Explanationn given by the appellant that he did not understood English properly is most inconvincing. As regards the use of c abbreviation M.M. in the statement of A.C.P. (Public Witness -4) under Section 161 of Cr.P.C. that has been explained by the A.C.P. himself. He testified that his statement was recorded by the I.0. He had used the word 'Metropolitan Magistrate' but the 1.0. while recording his statement abbreviated it with M.M. which expression is commonly used. This part of ACP's testimony is quite convincing and appears to be testified. A.C.P, however, has admitted that he did not sign any of the documents prepared at the site. Why he did not sign is not material nor on that account case of the prosecution would fail. Even adverse inference about the presence of the A.C.P. at the spot on this account Cannot be drawn. Merely, on this account the presence of the A.C.P. at the spot cannot be doubted.

(6) No evidence has been adduced by the prosecution to prove as to where the Cfsl form remained. As per Acp P.S.Tomar PW-4 and the investigating Officer Si Harbans Lal PW-7 the Cfsl form was filled up at the spot. But from the copy of the Register of Moharar Malkhana produced in Court as Ex.PW-2/A clearly show that Cfsl form was not deposited. If the Cfsl form was filled up and not deposited with

the sample then apparently there was every chance to tamper the sample. The seals affixed on Cfsl form were not available for the public analyst to compare with the seals on the sample. PW-3 Constable Bhupinder Singh who went to deposit the sample in the Office of the Cfsl no where slated that along with the sample he was given the Cfsl form nor he deposited the same in the office of CFSL. Similarly, Moharar Malkhana appearing as PW-2 also did not mention. that Cfsl form was deposited. thereforee, the statement. of the Sho PW-8 that the Cfsl form was deposited with the Moharar Malkhana stands refuted by the testimony of PW-2 & PW-3 as well as from Ex.PW-2/A i.e. copy of the Register of Malkhana. In view of the documentary evidence namely Ex.PW-2/A, it is clear that the Cfsl form was not deposited nor the same was sent to the office of Cfsl Along with the sample. A very glaring fact has come on record which points to the possibility of tampering with the sample. Mr.V.S.Bisaria, PW-9, Sr.Scientific Officer of the office of Cfsl proved on record only the forwarding letter dated 21st February,1989, through which the sample was deposited in the office of the CFSL. PW-9 further testified that on the reverse of that forwarding letter dated 21st February,1989 specimen of the seals were affixed. If that be so, then it is a clear case of tampering with the seals or the sample because sample was sealed and so was the Cfsl form at the Spot on 19th February,1989. Then how could forwarding letter dated 21st February,1989 was treated as Cfsl form by PW-9 and how seals were affixed on the reverse of this letter dated 21st February,1989 when the 1.0. says he collected back the seals from the public witness after 5-6 days. This aspect of PW-9's statement leads to only one conclusion that seals were in possession of the police or might have been obtained from public witness because he being owner of the Hotel was known to police, officials from before. Seals being affixed on the reverse of the letter dated 21st Pebruary,1989 lend support to this inference, otherwise there is no Explanationn given as to how the seal specimen found its way on the reverse of the letter dated 21st February,1989 particularly when the documents were filled up on 19th February,1989 and so was the Cfsl form. In the absence of any Explanationn I am in agreement with the contention of Mr.Sarin that presumption that sample was tampered cannot be ruled out. Since the senior police officials knew from before the so called public witness owner of the hotel hence inference can be drawn that they must have taken back the seals from him.

That is how seals could be affixed on the reverse of the said letter dated 21st February,1989. When the possibility of sample being tampered is there and office of Cfsl had no opportunity to compare the seals of sample with the seals on the Cfsl form then in the words of this Court in the case of Datu Ram V. State reported in 19961 Ad (Del) 521 wherein it was held that when the prosecution failed to prove the deposit of the Cfsl form in the Malkhana and thereafter taking it out Along with sample and deposit in the office of Cfsl in such a case linking evidence that sample was not tampered with being missing prosecution must fail.

(7) The so called independent witness PW-5 Surender Kumar, owner of the hotel was known to Si Harbans Lal, 1.0. of the case from before. What he stated if believed that the seals were handed over to him and those remained in his possession for five or six days then what is the Explanationn of those seals being affixed on the reverse of the letter dated 21st February,1989. This shows that Surender Kumar PW-5 has not told the truth. This fact in itself creates .a doubt about the sample remaining untampered. The road certificate has not been produced. Beside the above, there are many other material contradictions in the testimonies of PW-4 and PW-7. Acp Sh.P.S.Tomar (PW-4) stated that the 1.0. gave his search to the accused before searching the accused and the accused did search Si Harbans Lal before the search of the person of the accused took place. But surprisingly Si Harbans Lal, 1.0. of the case nowhere stated that he offered his personal search to the accused or that the accused did search him before the search of the accused took place. Bhupinder Singh (Public Witness -3) in no uncertain words stated that he took the case property only with him. He nowhere stated that he took Rukka from spot to police station. On account of the above material contradictions and violations of the provisions of the Act, to my mind, the appellant has been able to create doubt in the story of the prosecution as well as to the fact that sample remained intact so long it remained in the custody of the police.

(8) MR.ANIL Soni appearing for the State tried to explain the alleged contradiction in the testimony of Acp .Sh.P.S.Tomar (Public Witness -4) vis-a-vis. Rukka Ex.PW-7/C on the points of giving complete options under Section 50 of the Act.

(9) There appears to be force in the submission of Mr.Soni when he contended that there was no material difference in the statement of PW-4 A.C.P. and Rukka Ex.PW-7/C. In the Rukka it has been mentioned that the Acp after introducing himself and explaining his status asked the accused whether he would like to be searched before a Magistrate. The mere fact that in the Rukka word 'M.M.' has been used it does follow that at the spot A.C.P. must have used this abbreviation. There is no reason to disbelieve his testimony. As a normal practice while recording one tends to shorten the word. Some are not in the habit of writing full words, thereforee, we cannot loose sight of this phenomena and practical aspect of the same. If while recording the Rukka, he had used the word 'M.M.' and the A.C.P. has explained then Explanationn of the A.C.P. which carries clarification has to be accepted. Same is with regard to recording of his statement under Section 161 Cr.P.C. A.C.P. has explained at length that he introduced himself as A.C.P. and also told that he was Gazetted Officer. This can be inferred from the use of the word 'PAD' means position used in the Rukka Ex.PW-7/C. Why should it not be believed that while explaining his position he also intimated that he was Gazetted Officer. From the testimony of A.C.P. (Public Witness -4) which inspire confidence read with Ex.PW-7/C I am satisfied that provisions of Section 50 of the Act were complied with.

(10) From the above discussion the only ground on which appeal succeeds is the doubt with regard to the tampering of the sample created on account of the testimony of PW-9 V.S. Bisarika, when he admitted that he compared the seal on the parcel with the seals affixed en the reverage of the letter dated 21st February, 1989 and he treated that letter of 2l February,19B9 to be the Cfsl form which had the specimen seal of Hl & Tr affixed on that. This shows that the sample which was compared with the seal affixed on the letter dated 21st February,1989 either had been tampered with or it was not the same sample which is alleged to have been taken out from the smack recovered from the appellant, As already observed above, neither the Cfsl form was deposited with the Moharar Malkhana as is apparent from Ex.PW-2A nor the said Cfsl form dated 19th February,1989 was deposited in the office of the Cfsl for comparison. Hence, the presumption that sample was tampered with cannot be ruled out. The evades that sample remained intact is in this case which the prosecution tried to fill up by forging forwarding

letter of 21st February,1989 on the reverse pf which affixed sea;s purported to be of the impression of Hl & TR.

(11) For the reasons staled above, I accept the appeal and give benefit of doubt to the appellant. The appellant is accordingly acquitted. He is ordered to be released forthwith, if not required in any other case.