

Naveen Kumar Vs. State

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Court : Delhi

Decided On : Nov-10-1998

Reported in : 76(1998)DLT541; 1999(48)DRJ357

Judge : J.B. Goel, J.

Acts : Narcotic Drugs & [Psychotropic Substances Act, 1985](#) - Sections 18 and 50

Appeal No. : Crl. A. No. 212/93

Appellant : Naveen Kumar

Respondent : State

Advocate for Def. : Pawan Behl, Adv.

Advocate for Pet/Ap. : Sidharth Luthra, amices Curia

Disposition : Appeal dismissed

Judgement :

J.B. Goel, J.

1. This appeal is directed against the judgment of conviction and order of sentence both dated 29th October, 1993 passed by the learned Addl. Sessions Judge (ASJ) convicting the appellant for offence under Section 18 of Narcotic Drugs & Psychotropic Substances Act (for short the 'Act') and sentencing him to RI for 10

years and a fine of Rs. one lakh and in default of payment of fine RI for 2 years.

2. Briefly, the facts are that SI Prithvi Singh of Police Station Mukerjee Nagar along with Head Constable Lala Ram and Constable Janeshwar on 3.4.1990 at about 6.30 P.M. when present at Batra Cinema had received secret information that one person would come from Majnu Ka Tilla and go towards Nehru Vihar having opium in sufficient quantity and if he is caught the same could be recovered. The information was reduced in writing. S.I. Prithvi Singh joined two public witnesses Vijay Kumar and Ashok Kumar there and organized a raiding party which took position at Ganda Nala near Nehru Bazar. The accused was seen coming along with a brief case and at the pointing of the informer he was apprehended, told about the secret information and also asked that if he liked he could be searched before a Gazetted Officer or a Magistrate. The accused declined to be so searched in writing Ex. P.W.7/A. The brief case which he was carrying on checking was found to contain opium wrapped in a yellow towel. That was weighed and found to be 2 Kg. and 60 gms. 10 gms. was taken out as sample. Sample and remaining opium were separately sealed in two parcels and sealed with the seal of PS, Inspector. SHO Pritpal Singh had also reached there who also put his seal of PP and the same was seized vide seizure memo Ex. P.W.2/A. CFSL form was also prepared. The accused was arrested vide personal search memo Ex. P.W.2/B. Rukka was prepared and FIR got registered. The case property was deposited in the Police Malkhana and later on sent to CFSL and report Ex. PX was received which gave positive test of opium. The accused was put to trial for an offence under Section 18 of the Act.

3. Prosecution had examined in all 8 witnesses. P.W. 1 HC Mahabir Singh as duty officer registered FIR (Ex. P.W.1/A) on the basis of rukka. PW-3 H.C. Chand Singh was the Moharrar Malkhana who has proved entry of deposit of case property on 3.4.1990 and having sent the same to CFSL on 10.4.1990 through constable Devinder Singh. P.W.4 Constable Devinder Singh has deposed having taken the sample opium to CFSL from Malkhana and deposited thereof in intact condition on the same day. P.W.2 Ashok Kumar and P.W.5 Vijay Kumar are the two public witnesses who deposed about the apprehension of accused, his search and recovery of opium in their presence. However, they have not identified the

accused as the person from whom recovery was made though they have not stated that he was not the person from whom the opium was recovered. P.W.6 Inspector S. Pritpal Singh, SHO deposed that he had reached at the spot when the opium was recovered. P.W.7 HC Lala Ram and P. W.8 Prithvi Singh, I.O. of the case are the witnesses of recovery.

4. The accused in his statement under Section 313 Cr.P.C. has denied the alleged recovery of opium from his possession. He has taken the plea that he has been falsely implicated in the case; the opium was recovered from someone else who was let off and the same was planted on him. He has not led any evidence in defense. The learned trial court believed the prosecution evidence, found appellant guilty, convicted and sentenced him as aforesaid.

5. I have heard the learned counsel for the parties. Learned counsel for the appellant has challenged the legality and validity of the conviction on legal pleas as well as on the reliance placed on the evidence.

6. These contentions are contested by the learned counsel for the State.

7. The first contention is that Section 50 of the Act is mandatory, which has not been complied inasmuch as a notice in writing was not given to the accused, and in the alternative, the alleged notice is not valid, sufficient and proper and the evidence led on this point is contradictory and not reliable. Reliance has been placed on State of Punjab v. Balbir Singh, : 1994 CriLJ3702 and Mohinder Kumar v. The State of Panaji, Goa : 1995 CriLJ2074 .

8. Section 50(1) of the Act reads as under :-

'When any officer duly 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. In Balbir Singh case (Supra), it was held that this provision gives a valuable right to the person to be searched in the presence of a Gazetted Officer or a

Magistrate if he so requires, to afford such an opportunity to the person to be searched, he must be aware of this right and that can be done only by the officer making the search informing him. This provision would impart authenticity and credit-worthiness to the proceedings while equally providing an important safeguard to the accused. It is imperative on the part of the officer intending to make the search to inform the person to be searched of his right and if he chooses, he must be searched in the presence of a Gazetted officer or a Magistrate. The provision is mandatory and non-compliance vitiates the trial. This view has been approved and followed by a 3-Judges Bench of the Supreme Court in Saiyad Mohd. Saiyad Umar Saiyed and Ors. v. State of Gujarat : 1995 CriLJ2662 .

10. It is thus imperative on the part of the officer intending to search to inform the person to be searched of his right that if he chooses, he will be searched in the presence of a Gazetted Officer or a Magistrate.

11. The Act does not contain specific provision that such a notice must necessarily be given in writing. Whether such a notice has been given or not could be proved like any other fact in issue.

12. P.W. 2 Ashok Kumar, public witness in this respect has stated that the accused was told that if he liked he could be taken for search before a Magistrate but he declined. He was not cross examined on this aspect. P.W. 5 Vijay Kumar, another public witness has deposed that the accused was told that if he likes he could be taken before the Gazetted Officer or a Magistrate but he declined. He was also not cross examined. P.W. 7 HC Lala Ram has deposed that after he was apprehended, he was informed about the secret information and also informed that if he liked he could be searched before a Gazetted Officer but he declined vide writing Ex. P.W.7/A. He was also not cross examined on this aspect. P.W.8 Inspector Prithvi Singh (formerly S.I.) who was heading the raiding party has deposed that before search the accused was informed that if he would like he could be searched before a Gazetted Officer or a Magistrate but he declined vide Ex. PW-7/A. Suggestion was put to him that writing Ex. PW.7/A is not written by the accused, he has denied it.

13. There are some variations in the statements of these four witnesses. Whereas P.W. 2 has deposed that the option given was whether he wanted to be searched in the presence of a Magistrate. P.W.7 has deposed that the option given was if he wanted to be searched before a Gazetted Officer whereas P.W.5 and P.W.8 have deposed that the option given was if he liked to be searched before a Gazetted Officer or a Magistrate. In the statement of the accused under Section 313 of the Code, the suggestion put is that the option given was whether he wanted to be searched before a Gazetted Officer.

14. Learned counsel has contended that, firstly such option was not given, secondly there are material contradictions in the statements of these witnesses; thirdly examination under Section 313 also shows that the option given was partial and is not proper. For this reason, Section 313 Cr.P.C. has also not been complied.

15. P.W.5 public witness and P.W.8 I.O. have deposed that the option given was being searched before a Gazetted Officer or a Magistrate. P.W.2 has stated the option was for being searched in the presence of a Magistrate whereas P.W.7 has stated that the option was to be searched in the presence of a Gazetted Officer. In this respect P.W.2 and P.W.7 to some extent contradict each other. Their testimony cannot be preferred to that of P.W.5 and P.W.8. P.W.7/A is the writing alleged to have been given by the accused declining the option wherein it is stated that the accused does not want to be searched before a Magistrate or a Gazetted Officer. This is signed by him. This writing has been proved by P.W.7 first and he was not cross examined. P.W.8 has also deposed that the accused had given this writing and in cross examination he has denied that this is not written by the accused. In view of this there is no reason to disbelieve that the writing P.W.7/A was not given by the accused and that it is not signed by him. This writing itself shows that the option was given to the petitioner to be searched in the presence of a Magistrate or a Gazetted Officer but the accused had declined.

16. No doubt in statement under Section 313 the suggestion put was that he was asked if he wanted to be searched before a Gazetted Officer and it does not show that it was also for being searched before a Magistrate also. In reply to this

question, the accused has denied it as incorrect. He has not taken the plea that he was not given the option of being searched before a Magistrate and that had it been given he would have so exercised. In the circumstances, it cannot be said that he has been prejudiced in this respect. More so when he himself had given writing Ex. P.W.7/A declining to be so searched.

17. This evidence has been believed by the trial court. This finding is based on material on record and is reasonable and proper. There is no valid reason to take a different view.

18. Learned counsel has also contended that the search and recovery are bogus and nothing had been recovered from the appellant and that the two public witnesses P.W.2 and P.W. 5 have not identified that this recovery was from the accused/appellant.

19. P.W. 7 HC Lala Ram and P.W.8 Inspector (formerly S.I.) Prithvi Singh are two police officials of this recovery. PW-8 was heading the raiding party. Both have deposed that they along with Constable Janeshwar Prasad were present at Batra Cinema Police Booth at 6.30 P.M. when a secret information was received by Inspec-tor Prithvi Singh that one person would come from Majnu Ka Tila and go towards Nehru Bazar and would be having opium in sufficient quantity. The information was reduced in writing. Ashok Kumar and Vijay Kumar, two public witnesses were joined; they took position at Ganda Nullah near Mukerjee Nagar - Baandh; on the pointing of the informer, the accused was seen coming, he was apprehended; then informed about the secret information. He was given the option being searched in presence of a Gazetted Officer or a Magistrate but he declined vide his writing Ex. P.W.7/A. From search of the briefcase Ex. P.I which he was carrying, 2 Kg. and 60 gms. opium was recovered. 1.0 gms was taken as sample and sample and remaining opium were sealed in two separate parcels. SHO had also reached and these packets were separately sealed with the seals of PP and PS and seized vide memo Ex. P.W.2/A. Accused was arrested by personal search memo Ex. P.W.2/B. Exs. P.I, P.2, P.3 and P.4 are the bag, opium, polythene cover and towel from which it was recovered. In cross examination nothing which may cast doubt on their testimony has been elicited except a suggestion that the

accused was not apprehended at the spot or his search was not carried out in the presence of the two public witnesses which was denied.

20. P.W. 8 has denied the suggestion that the opium was recovered from someone else who was let off and the same was planted on him. This suggestion has not been put to P.W.7 and the public witnesses, P.W.2 and P.W.5.

21. P.W.2 and P.W.5 have deposed that they had joined the raiding party on being asked by PW-6; they were informed about secret information, in their presence a boy was apprehended. The bag he was carrying was checked which contained something black in colour which was found weighing 2 Kgs. and some grams. Sample was taken. The sample and remaining opium were converted into two parcels and sealed with the seal of PS and seized vide memo P.W.2/A. However, both have stated that they could not identify the person from whom the recovery was made. The personal search of the boy is Ex. P.W.2/B. They have not stated that it was not the accused from whom this recovery was made.

22. Obviously it was the appellant/accused who was that boy and from whom the recovery was made who was arrested vide personal search memo P.W.2/B. P.W.6, Inspector Pritpal Singh SHO has deposed that while on patrolling at about 7.00 P.M., he had reached the spot where Prithvi Singh, with HC Lala Ram, two public witnesses and the accused were present, Inspector Prithvi Singh had apprised him of the facts and about recovery of 2.60 Kgs. of opium. Samples and remaining article were sealed with the seals of PS and PP. He had deposited the case property in the Malkhana. P.W.8 has also stated that after recovery was made he had drawn rukka Ex. P.W.I/A. P.W.7 had taken the rukka and FIR was registered by P.W.I. PW-1 has proved it (Ex. P.W.I/B). None of these witnesses have been cross examined on this aspect. P.W.3 has deposed that he was working as Moharrar Malkhana and case property was deposited with him on 3.4.1990 which he had entered into register and proved its entry Ex. P.W.3/A; he has also deposed that the sample was sent to the CFSL through Constable Devinder Singh, the latter has corroborated him. Both of them were also not cross examined. No infirmity or inherent improbability in the testimonies of these witnesses have been pointed out except that PW-2 and PW-5 have not named the

accused.

23. Learned trial court has believed the evidence. This finding is also based on the material on record, is reasonable and proper and calls for no interference. Ex. PX is the CFSL report which has given positive test for opium. Thus it is proved that opium weighing 2 kg and 60 gms. was recovered from the appellant.

24. Learned counsel for the appellant has also contended that it is not proved that CFSL form was filled in at the time of seizure or it was deposited in the Malkhana or sent along with the sample to the CFSL. The contention is that in the absence of proof of it, it cannot be said that it is the same sample which was tested by the Analyst.

25. P.W.6 SHO Pritpal Singh has deposed that CFSL form was filled up and he was not cross examined on this aspect. The purpose of CFSL form is to ensure the purity of the sample, seized from the date of the seizure till it reaches the CFSL Analyst. P.Ws, 2, 5, 6, 7 and 8 have deposed that the sample was taken, sample and the remaining opium were separately sealed. PW-6 and PW,8 have deposed that these were with the seals of PS and PP. It has also been deposed that the case property was deposited in the Malkhana. P.W.3 HC Chand Singh has also deposed that the two parcels sealed with the seals of PP and PS were deposited with him which he had entered at Sl. No.230 and proved its entry Ex.PW-3/A, the sample was sent to CFSL on 10.4.1990 through Davinder Singh Constable vide RC 11/21. He was not cross examined about the deposit of the case property with seals intact till it was handed over to PW-4. PW-4 Constable Devinder Singh has also deposed that he had taken the sample with seals of PS and PP thereon vide road certificate and deposited the same in CFSL office safely without its being tampered. He was also not cross examined.

26. Ex. PX is the CFSL report which also shows that the sample parcel was received sealed along with the specimen seals of PP-1 and PS-1 intact. There is no evidence to the contrary that the sample was not duly sealed or the seals were tampered with after its seizure till it reached the CFSL Analyst. The learned trial court has believed the testimony/evidence to this effect also. This finding is also based on the material on record and is reasonable and justified. It also calls for no

interference.

27. In view of this discussion, I do not find any illegality or infirmity in the findings of conviction. The same is upheld.

28. The learned Trial Court has considered the circumstances of the accused while imposing the sentence. The sentence of 10 years and fine of Rs.1 lakh is the minimum prescribed under law. In default of payment of fine, further RI of two years has been imposed. This is not challenged during arguments. This also calls for no interference.

29. For the reasons given above, this appeal has no merit and the same is hereby dismissed.

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