Pawan Mehta Vs. the State

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SooperKanoon Citation : sooperkanoon.com/704291

Court : Delhi

Decided On : Sep-25-2001

Reported in : 2002CriLJ1933; 2001(60)DRJ727; 2002(79)ECC430

Judge : S.K. Agarwal, J.

Acts : Narcotic Drugs and Psychotropic Substances Act - Sections 18, 25, 35, 35(2), 37, 42, 50 and 50(1); Code of Criminal Procedure (CrPC) , 1973 - Sections 389

Appeal No. : Crl. M. 857/2001 in Crl. A. 691/2000, Crl. M. 2925/2001 in Crl. A. 692/2000 and Crl. M. 303/2001 in

Appellant : Pawan Mehta;naveen Mehta;sanjeev Singh

Respondent : The State;The State;The State

Advocate for Def. : O.P. Saxena, ; Pawan Sharma and ; Richa Kapur, Advs.

Advocate for Pet/Ap. : K.B. Andley, Sr. Adv.,; Sanjiv Kumar,; J.R. Priyani,;

Disposition : Applications dismissed

Judgement :

S.K. Agarwal, J.

1. The appellants were held guilty under Sections 18 and 25 of the Narcotic Drugs and Psychotropic Substance Act (for short 'the Act'), in the case FIR No. 137/89, P.S. Karol Bagh, and sentenced to imprisonment for ten years and fine of Rs. 1.0 lac, in default, further imprisonment for one year each, by the judgment and order dated 9th November, 2000, passed by the Court of Addl. Sessions Judge, Delhi. Appeals against the said judgment and order have already been admitted. This order will dispose of their applications under Section 389 Cr.P.C. for suspension of sentence during pendency of the appeal and for being released on bail.

2. Facts necessary for the disposal of these applications are: on 17th April, 1989 at about 11.45 a.m. secret information was received at P.S. Karol Bagh that a white colour maruti car would be passing through the area with huge quantity of opium. The information (Ex. PW-7/A) was reduced into writing and raiding party was put in position. Maruti car DAJ 3594 was intercepted. It was being driven by Pawan Mehta and Naveen Mehta was found sitting on the front seat. They were told about the information and the presence of ACP Alok Kumar at the spot. Notices under Section 50 of the Act, (Ex.PW-6/A & Ex.PW.6/B) were served on them. They declined the offer of getting themselves searched before the Metropolitan Magistrate or the Gazetted Officer. A bag laying between two front seats of the car was found containing 7.180 kg. of opium in eight packets of polythene. Samples were drawn and sent to the CFSL for analysis. Copy of the Registration Book of the car was found with one of them. It showed that the car belonged to Sanjeev Singh (appellant), and on their pointing out, he was Laos arrested. Investigations were completed and challan was filed. After trial, all three appellants were held guilty and sentenced as aforesaid. They filed three separate appeals which have been admitted. The trial court also ordered confiscation of maruti car against which separate appeal has been filed. Learned counsel for the appellants and learned APP for the State have argued the matter at length and taken me through the record.

3. The Supreme Court in Dadu @ Tulsidas v. State of Maharashtra : 2000 CriLJ4619 , has held that during the pendency of an appeal against conviction under the Act, sentence can be suspended but subject to the limitations prescribed under Section 37 of the Act. This Section prohibits release of any person accused

of the offence under the Act, punishable for a term of imprisonment of five years or more, unless the Court is satisfied that there are reasonable grounds for believing, that he is not guilty of such offence and that if released on bail, he is not likely to commit any offence. The question that arises for consideration is whether in this case, on the basis of the material on record, satisfaction can be reached that the appellants are not guilty of such offence, despite conviction having been recorded against them by the trial court?

4. Learned counsel for appellants, assailing the impugned judgment and order, firstly argued that as per prosecution allegations, the search was conducted on prior information. That being so, at the time of their search under Section 50 of the Act, the Investigation Officer was bound to inform the appellants of their right to be searched in the presence of either a Gazetted Officer or Magistrate. The failure to inform the appellants of their right, rendered the search illegal, as they were not able to avail of the protection provided under the Act. Thus, it was argued that conviction and sentence of the appellants is bad in law. Reliance was placed on Kalayath Nassar v. State of Kerala : 2000 CriLJ817 and K. Mohan v. State of Kerala, .

5. Law in this regard is well settled by the five Judges Constitution Bench of the Supreme Court in State of Punjab v. Baldev Singh, : (1999)6SCC172 , authoritatively laying down, that whenever, an empowered officer acting on prior information is about to search a person, it is imperative for him to inform, either in writing or orally, such person of his right under sub-Section (1) of Section 50 of Act of getting his search carried out either before Gazetted Officer or Magistrate. It was held:

'57. On the basis of the reasoning and discussion above, the following conclusions arise:

(1) That when an empowered officer or a duly authorised officer acting on prior information is about to search a person, it is imperative for him to inform the person concerned of his right under sub-section (1) of Section 50 of being taken to the nearest gazetted officer or the nearest Magistrate for making the search. However, such information may not necessarily be in writing.

(2) That failure to inform the person concerned about the existence of his right to be searched before a gazetted officer or a Magistrate would cause prejudice to an accused.

(3) That a search made by an empowered officer, on prior information, without informing the person of his right that if he so requires, he shall be taken before a gazetted officer or a Magistrate for search and in case he so opts, failure to conduct his search before a gazetted officer of a Magistrate, may not vitiate the trial but would render the recovery of the illicit article suspect and vitiate the conviction and sentence of an accused, where the conviction has been recorded only on the basis of the possession of the illicit article, recovered from his person, during a search conducted in violation of the provisions of Section 50 of the Act.'

6. The Court in the above-noted case, after considering its earlier decisions, the object and the purpose of Section 50 of the Act, restricted its operation to only when the person of the accused was to be searched and not the premises etc. It was further held:

12. 'On its plain reading, Section 50 would come into play only in the case of a search of a person as distinguished from search of any premises etc. However, if the empowered officer, without any prior information as contemplated by Section 41 of the Act makes a search or causes arrest of a person during the normal course of investigation into an offence or suspected offence and on completion of that search, a contraband under the NDPS Act is also recovered, the requirements of Section 50 of the Act are not attracted.'

(emphasised supplied)

7. The Supreme Court in the subsequent decisions, applying the above principles held Section 50 of the Act as not applicable where the narcotics drug was recovered from the bag being held by the accused; from the bag hanging on the handle of the scooter; from the bag on which the accused was found sitting or from the baggage of the foreigner who arrived at the Airport. Reference in his regard can be made to following decisions:

(1) In Bira Kishore Kar v. State of Orissa, : AIR 2000 SC3626 , Section 50 of the Act was held to be not applicable, where the accused was found sitting on the plastic bag containing poppy strew.

(2) In Sarjudas and another v. State of Gujarat, : 2000 CriLJ509 , Section 50 was held to be not applicable, where drug was found in a bag hanging on the handle of the Scooter driven by the accused.

(3) In Kalema Tumba v. State of Maharashtra and another 1999 SCC (Cri) 1422, Section 50 was held to be not applicable where the narcotic drug was found from the bag carried by the person. It was held -- 'if a person is carrying a bag or some other article with him and a narcotic drug or a psychotropic substance is found from it, it cannot be said that it was found from his 'person'.

(4) In Gurbax Singh v. State of Haryana, : 2001 CriLJ1166 , Section 50 of the Act was held to be not applicable where the person was carrying poppy husk placed in a polythene bag.

8. Learned counsel for the appellants also argued that the above noted cases are the two Judges Bench decisions of the Supreme Court and that observations made by the Supreme Court in Namdi Francis Nwazor v. Union of India and another : 1996 CriLJ2503 (three judges bench decision) to the effect 'We must hasten to clarify that if that person is carrying a hand bag or like and the incriminating article is found there from, it would still be a search of the person of the accused requiring compliance with Section 50 of the Act' would prevail. In support of their submission, reliance was placed on the observations made by learned Judge of this court in Crl.A.No. 23/1995 decided on 17-4-2001 (Narender Singh v. State). I am unable to agree. After the five Judges Constitution Bench Decision in Baldev Singh's case (supra) holding that section 50 of the Act would not apply when the person of the accused is not being searched and several recent decisions of the Supreme Court applying these principles, there is no scope for this argument. In view of the above, authorities cited by learned counsel for the appellants are not applicable to the facts of the case.

Lastly Shri I.U. Khan, learned counsel for appellant Sanjeev Singh further argued that nothing incriminating was recovered from him; he was not present at the spot in the car or near about the car when the opium was allegedly seized; that he had no knowledge about the same. He argued that there is nothing on record to show that the appellant knowingly permitted use of his car for the commission of the offence under the Act and, thereforee, his conviction is not sustainable. Reliance was placed on Balbir Singh v. State of Orissa : 1995(I)OLR143 , Kalen Khan v. State of Madhya Pradesh and Smt. Anima Prava Roy v. State of Andhra Pradesh 1999 (3) Cri.L.J. 2564. Learned APP for State argued to the contrary.

9. Section 25 of the Act provides punishment for allowing the premises or vehicle etc. to be used for commission of an offence. The essential requisite for constituting the offence under this Section is that if the owner or occupier of the premises or vehicle, having control over it, knowingly permits it to be used for the commission of any offence, he is liable for prosecution under this Section. It reads:-

'25. Punishment for allowing, premises, etc., to be used for commission of an offence.--Whoever, being the owner or occupier or having the control or use of any house, room, enclosure, space, place, animal or conveyance, knowingly permits it to be used for the commission by any other person of an offence punishable under any provision of this Act, shall be punishable with rigorous imprisonment for a term which shall not be less than ten years but which may extend to twenty years and shall also be liable to fine which shall not be less than one lakh rupees but which may extend to two lakh rupees:

Provided that the Court may, for reasons to be recorded in the judgment, impose a fine exceeding two lakh rupees.'

10. Regarding of the above Section show that mere user of the vehicle cannot be enough to fasten the liability on the owner or occupier. It has to be further proved that the premises or the vehicle etc. was permitted to be used 'knowingly' by such person. However, Section 35 of the Act, provides that culpable state of mind or the knowledge of the accused required to be proved under the Act, has to be presumed and it is for the accused to prove that he had no such 'knowledge or the

mental state'. It reads:

'35. Presumption of culpable mental state.-(1) in any prosecution for an offence under this Act, which requires a culpable mental state of the accused, the court shall presume the existence of such mental state but it shall be a defense for the accused to prove the fact that he had not such mental state with respect to the act charged as an offence in that prosecution.

Explanation - In this Section 'culpable mental state' includes intention, motive, knowledge of a fact and belief in, or reason to believe, a fact.

(2) For the purpose of this section, a fact is said to be proved only when the court believed it to exist beyond a reasonable doubt and not merely when its existence is established by a preponderance of probability.'

11. By Section 35 of the Act, rules of evidence stand changed. The Explanationn to the Section provides that the 'mental state' shall include 'intention', 'knowledge' and 'motive' of the fact or the belief therein and sub-section (2) of this Section mandates that such a fact would be deemed to be proved only when the Court believes it to exist beyond reasonable doubt. Thus, the legislature, in its wisdom, has shifted the burden of proof to the accused and that too not by the test of preponderance of probabilities but beyond reasonable doubt. He can discharge the onus either by relying on the prosecution evidence or by eliciting answers from the prosecution witnesses in cross-examination or by leading evidence. Reference in this regard can be made to the recent Supreme Court decision in Abdul Rashid Irahim Mansuri v. State of Gujarat, : 2000 CriLJ1384 wherein it was held:

'22. The burden of proof cast on the accused under Section 35 can be discharged through different modes. One is that, he can rely on the materials available in the prosecution evidence. Next is, in addition to that he can elicit answers from prosecution witnesses through cross-examination to dispel any such doubt. He may also adduce other evidence when he is called upon to enter on his defense. In other words, if circumstances appearing in prosecution case or in the prosecution evidence are such as to give reasonable assurance to the court that appellant could not have had the knowledge or the required intention, the burden

cast on him under Section 35 of the Act would stand discharged even if he has not adduced any other evidence of his own when he is called upon to enter on his defense.'

(emphasis supplied).

12. Applying the above principles, in this case it is not in dispute that the car is question belonged to the appellant Sanjeev Singh. Copy of the RC Book of the car was found in possession of one of the accused arrested on the spot. The appellant was arrested at the pointing out of accused persons arrested at spot. There is nothing on record to suggest as to how the car in question came to be in possession of the Pawan Mehta and Naveen Mehta who were arrested at the spot with the narcotics drug. The case of the appellant appears to be, that the said car was taken from his residence by the police and narcotics drug was planted. In his statement he has stated:-

'I am innocent. I have been falsely implicated. I was picked up from my house along with my car and taken at the Police Station. I have been falsely implicated in this case. My signatures were obtained on few papers under force'.

13. He did not lead any evidence in defense. Nothing was brought to my notice either from the prosecution evidence or documents wherefrom it can be inferred that the appellant could not have had the knowledge. On the basis of above material, at this stage, it is not possible to hold that appellant has proved that the car in question was used for carrying the narcotic drugs without his knowledge. Detailed reference to the judgments relied upon by learned counsel for the appellant is not necessary, in view of the authoritative pronouncement by the Supreme Court in the case of Abdul Rashid Ibrahim Mansuri v. State of Gujarat (Supra).

14. For the foregoing reasons, in my considered view, no case for suspension of sentence is made out. The applications are dismissed.

15. Any observation made herein shall not affect the merits of the case.