Mohd. Hanif Vs. State

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Court : Delhi

Decided On : Sep-02-1998

Reported in : 1998(47)DRJ14

Judge : J.B. Goel, J.

Acts : Narcotic Drugs and Psychotropic Substances Act, 1985 - Sections 20, 50 and 57

Appeal No. : Crl. A. No. 138/92

Appellant : Mohd. Hanif

Respondent : State

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

Advocate for Pet/Ap. : Siddarth Luthra, Adv

Judgement :

J.B. Goel, J.

1. In this appeal, the appellant challenges the validity and propriety of his conviction and order of sentence passed on 17.7.1992 by the Addl. Sessions Judge, Delhi convicting him for an offence under Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short the 'Act') and sentencing him to

RI for 10 years and a fine of Rs. one lakh, in default of payment of fine further RI for two years.

2. Briefly, the prosecution case is that on 5.1.1989 SI Varinder Singh posted at Police Station Kamla Market was on patrolling duty when Const. Rewat Ram also met him. He received secret information that one person will come from Pul Pahar Ganj with Charas in his possession. The said SI recorded the said information and organized a raiding party. Some public persons were asked to join but they declined except one Ajay who was returning from his duty and going home had agreed and he was joined in the said raiding parly. At about 8.30 p.m. on the pointing out of the informer the accused was arrested near shop No. 5234, G.B. Road, Delhi; he was told about the secret information received that he was carrying charas and was also told that if he wanted, his search could be made in the presence of a Gazetted Officer or Magistrate. The accused declined to exercise the option. In the meantime, PW-2, Officer-in-Charge of the Police Station also reached there. Accused was carrying a bag with him, on search it was found to contain three packets in polythene papers which contained charas each weighing 500 gins. 100 Gms. sample was taken from each packet. These samples and the remaining charas were separately converted into parcels and seal of VS was put by SI Virendar Singh and handed over to the SHO who also put his seal of RK. CFSL form was also filled and sealed with sample seals of VS and RK. Rukka was drawn, and FIR was registered. The accused was arrested. CFSL report gave positive test of Charas. Accused was put to trial for an offence under Section 20 of the Act. During trial prosecution examined in all seven witnesses. PW-1 ASI Rameshwar Singh had registered the FIR Ex. PW1/A on the basis of rukka. PW2 Insp. Ram Kishan was the SHO, he had reached the spot and has deposed that the said recovery was made in his presence. PW-3 H.C. Jagat Singh the Moharrar Malkhana has deposed about deposit of case property and proved Ex. PW3/A copy of relevant entry in the register. PW-4, Ajay is the public witness. He has not supported the prosecution case though he has admitted his signatures on seizure memo Ex. PW4/A and arrest Memo Ex. PW4/B.

3. PW-5 H.C. Rajinder Singh had deposed about having deposited the sealed samples with CFSL. PW-6 H.C. Rewat Ram has deposed supporting the

prosecution case as an eye witness. PW-7 is the Investigating Officer and was heading the search party; he has also supported the prosecution case.

4. The accused in his statement under Section 313 Cr.P.C. denied the alleged recovery and took the plea that he had been falsely implicated.

5. The appellant was provided an amices Curiae.

6. I have heard learned counsel for the parties. Learned counsel for the appellant has contended that provisions of Sections 50, 55 and 57 of the Act have not been complied with. These are mandatory and non-compliance thereof vitiates the trial. He has also contended that notice under Section 50 was not given. Reliance has been placed on Mohinder Kumar v. The State, Panaji, Goa : 1995 CriLJ2074 . He has also contended that even otherwise the public witness has not supported the prosecution case and other witnesses who are police officers are interested witnesses and their testimony should not have been believed. He has also contended that CFSL form was not prepared and sent to CFSL which also casts doubt about the purity of the sample.

7. The first question is whether the provisions of Section 50 of the Act have been complied with. If not to what effect? Section 50 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.'

8. This provision came for consideration in State of Punjab v.Balbir Singh : 1994 CriLJ3702 where it was held that Section 50 confers a valuable right on the person to be searched in the presence of a Gazetted Officer or a Magistrate if he so requires. Such a search would impart much more authenticity and creditworthiness to the proceedings while equally providing an important safeguard to the accused. The authorised officer is obliged to inform the accused of this right of the accused to afford him aproper opportunity to make option. This provision confers an

important and valuable right and is intended to minimise the allegations of planting or fabricating by the prosecution and is mandatory. Its non-compliance would affect the prosecution case and vitiate the trial.

9. Again in Mohinder Kumar v. The State, Panaji, Goa (supra) it was held that the provisions of the said Section are mandatory and non-compliance thereof vitiates the trial. Whether this provision has been complied or not could be proved like any other fact.

10. Learned trial court has believed PW6 and PW7 that an option was given to the accused of being searched in the presence of a Gazetted Officer or a Magistrate but he declined the same and the provisions of Section SO have been complied with.

11. P.W.6 H.C. Rewat Ram and P.W.7 S.I. Virender Singh have deposed that the accused was informed about the secret information and also told that if he wanted he could be searched before a Gazetted Officer or a Magistrate which he had declined. There is no specific cross-examination of the witnesses on this aspect. Suggestions have been put to them in the cross examination primarily to show that public witnesses were available but no effort was made to join them. And then a general suggestion has been put that nothing was recovered from the accused and that they were deposing falsely which they denied. No suggestion has been put that the accused was not intercepted, searched, the charas recovered and he was arrested at the spot. P.W.2, SHO has deposed that he had also reached the spot and recovery was affected in his presence.

12. No doubt a written notice to this effect has not been given nor option obtained in writing. However, it is not the requirement of law prescribed under Section 50 of the Act that such notice should be given in writing or option should also be obtained in writing. The fact that such an option was given has also been mentioned in the Rukka Ex. PW7/A. Except taking a plea that he was innocent and falsely implicated the accused in cross-examination or in his statement under Section 313 Cr.P.C. has not suggested any circumstance suggestive of false implication or not being arrested at the alleged place of search.

13. PW-4 is a public witness who was joined at the time of the search. He has not supported the prosecution case and has deposed that he did not know the accused and nothing was recovered from him in his presence. He further stated that he was made to sign some papers and then permitted to go. He had however admitted that Seizure Memo Ex. Pw4/A and personal Search Memo Ex. PW4/B are signed by him. He has stated that these were signed on the asking of Shri Dahiya of P.S. Kamla Market at Ajmeri Gate. He has not stated that he had signed on blank papers or that his signatures were obtained under duress, threat or coercion. He had obviously signed these two memos at the spot. On being cross-examined on behalf of the State on 29.11.1989 he had stated that his statement was recorded by SI Varinder Singh, his cross-examination was deferred and on 17.1.1990 he stated that his statement was not recorded by the police. Obviously he is not telling the truth and it could be either having been won over or under some threat or duress of the accused. PW-2 SHO Ram Kishan, PW-6 H.C. Rewat Ram and PW-7 SI Virendar Singh have deposed that the accused was apprehended and his search was taken in front of shop No. 5234, G.B. Road, Delhi. This place is near Ajmeri Gate chowk as per site plan Ex. PW7/B. Neither any suggestionhas been put to any of these witnesses nor it is his case in his statement under Section 313 Cr.P.C. that he was not present and arrested at that place. Simply because PW2, PW6 and PW7 are police officials it cannot be said that they are not trustworthy and reliable witnesses. They are corroborated by memo Ex. PW 4/A and Ex. PW4/B, signed by Const. Rewat Ram, public witness Ajay as witnesses recorded by SI Virendar Singh. PW-4 Ajay has deposed that he had signed these memos at Ajmeri Gate. Obviously these were recorded at Ajmeri Gate. These show that the accused was arrested there. In my view, in these circumstances, the findings of the learned trial court that the accused was apprehended at the said spot; he was informed about the secret information; was given option of being searched in presence of a Gazetted officer or a Magistrate which the accused had declined, and then on his search charas as alleged was recovered from his possession and the provisions of Section 50 of the Act have been complied with are reasonable, justified and based on material on record are upheld.

14. learned counsel for the appellant has then contended that in the statement under Section 313 Cr.P.C. the suggestion put to the accused shows that partial option was given to him which does not comply with Section 50 of the Act.

15. In his statement under Section 313 suggestion put is that he was told that if he liked he could be searched before a Gazetted officer and this does not show that the option also included the option to be searched in the presence of a 'Magistrate' also. The accused in reply has stated that it is incorrect. He has not stated that he had not been given the alternate option of being searched in the presence of a Magistrate also. Obviously there is an accidental omission in this suggestion. This suggestion had been given on the basis of the material available on record. The material was in the statements of PWs 6 and 7 both of whom had stated that he was given the option of being searched in the presence of a Gazetted officer or a Magistrate. In view of this answer, it cannot be said that he has been prejudiced in this respect. Moreover, in cross-examination of PW-4, 6 and PW7 there was no suggestion that such option under Section 50 of the Act was not given to him. This objection has no force.

16. PW-4, the public witness has not supported the prosecution case. The other witnesses are police officials. 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.

17. The learned trial court has considered the oral testimony of the other three witnesses of recovery. PW-2, SHO, PW-6 and PW-7 and has believed their testimony. Nothing has been pointed out in their testimony to discredit them.

18. Learned counsel for the appellant has also contended that because of violation of certain provisions of the Act their testimony ought not have been believed.

19. The contention is that Section 57 of the Act has not been complied with inasmuch as the report about the search and arrest was not sent to the higher officers. In Balbir Singh case (supra) it was held that provisions of S. 52 and 57 are by themselves not mandatory. If there is no strict compliance of any of these

provisions that by itself cannot invalidate the trial or the conviction if otherwise, there is sufficient material. It may affect the probative value of the evidence regarding arrest or search. In case of the non-compliance it has to be shown that such non-compliance has resulted in prejudice and failure of justice.

20. After the search and seizure was made, a rukka was drawn at the spot. PW-6 has deposed that he had taken that rukka to the Police Station and got the FIR registered. PW-1 was the duty officer. He has deposed that on the basis of this rukka he had registered FIR, copy of which is Ex. PW1/A and had made endorsement of such registration Ex. PW1/B on that rukka. PW-1 and PW-6 have not been cross-examined about the date and time of the FIR. The FIR was registered at 9.35 p.m. on the day of occurrence as per Ex. PW1/B. The search and arrest was made at about 8.40 p.m. Obviously, the FIR was registered without any delay. It thus cannot be said that any prejudice has been caused to the accused. Moreover, the search was made by SI Varinder Singh in the presence of the SHO Ram Kishan, who is his immediate senior officer. In that respect provisions of Section 57 have also been complied. This contention has no force.

21. Learned counsel for the appellant has then contended that it is not proved that CFSL form with sample seals of the IO and SHO was prepared at the time of taking sample at the spot, nor that it was deposited in Malkhana with sample and sent to the CFSL Analyst. As such it cannot be said that the purity of the sample was in tact till it was analysed by the Analyser.

22. The purpose of specimen seal is to compare the same with the seals on the sample parcels meant for analysis and report by CFSL to ensure that the samples are not tampered with.

23. PW2, PW6 and PW7 have deposed that CFSL form with the sample seals of VS of the IO and RK of the SHO was prepared, given to the SHO. PW-2 has further stated that he had deposited the same Along with the case property and the samples in the Malkhana. They were not cross-examined on this aspect. PW-3 Malkhana Mohrar has proved Ex. PW3/A copy of the relevant entry of the deposit of the case property. He has stated that CFSL form was also deposited. He was not cross-examined on this point. PW-5 who had taken the samples to CFSL has

not stated that he had also taken the CFSL Form Along with the samples to CFSL office. CFSL report Ex. PX states as under :-

Description of the Parcel and Condition of Seal

Received three sealed cloth parcels with seal intact VS-1 and RK-1 on each parcel as official specimen enclosed.

CFSL form is intended to ensure the purity of the sample till it reaches the Analyser. There is thus evidence on the record to show that the samples remained in tact after its seizure and till it reached the Analyser. There is nothing to the contrary.

PW-2 SHO has stated that the IO had handed over the case property as well as samples duly sealed and he had deposited the same himself in the malkhana in tact. He was not cross-examined. PW-3 Malkhana Mohrar has deposed that the case property duly sealed was duly deposited with him on 5.1.1989 by the SHO and it was sent to CFSL on 6.1.89 through Const.

Rajinder Singh and so long as the case property remained in his possession it was not tampered with. In his cross-examination nothing has been elicited from this witness. PW5 Const. Rajinder Singh, now Head Constable had deposed that he had deposited the samples duly sealed with CFSL office without it being tampered with. He was also not cross-examined. The learned trial court has considered the material on record and has held that there was no scope for tampering with the ease property. This finding also cannot be said to be unreasonable or not based on material on record.. This contention thus also has no merit.

Learned counsel for the appellant has submitted that the sentence is too harsh and excessive. Section 20 itself prescribes minimum sentence of 10 years and a fine of Rs. 1,00,000/- which has also been awarded by the trial court. However, in default of payment of fine the trial court has sentenced to two years RI which seems to be excessive in the circumstances taking into consideration the recovery. It will meet the ends of justice if the sentence in case of non-payment of fine is reduced from two years RI to six months RI. No other point has been urged.

The conviction of the appellant is accordingly upheld. While substantive sentences of imprisonment and fine arc maintained but in case of default in payment of fine of Rs. One lac, the appellant shall under RI for six months. This appeal is disposed in the above terms.

The appellant shall be informed through Superintendent Jail .