

Munna Ali Vs. State

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Court : Delhi

Decided On : Oct-22-1998

Reported in : 1998(47)DRJ746

Judge : J.B. Goel, J.

Acts : [Narcotic Drugs and Psychotropic Substances Act, 1985](#) - Sections 50(1)

Appeal No. : Crl.A. No. 139/97

Appellant : Munna Ali

Respondent : State

Advocate for Def. : HJS Ahluwalia, Adv.

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

Disposition : Appeal allowed

Judgement :

J.B. Goel, J.

1. This appeal is directed against the judgment of conviction and order of sentence dated 29th and 31st January, 1996 passed by the learned Addl. Sessions Judge convicting the appellant for offence under Section 20 of Narcotic Drugs & Psychotropic Substances Act (for short the 'Act') and sentencing him to RI for 10

years and a fine of Rs. one lac and in default of payment of fine RI for 1/1-2 years.

2. Briefly, the facts are that the SHO, Police Station Kashmere Gate Along with SI Ram Singh and Cts. Rajinder Singh, Ravinder Kumar and Bali Ram were on patrolling duty in Government vehicle, at about 8.30 p.m. they were present at Boulevard Road Chowk, secret information was received by SI Ram Singh that a person wearing particular clothes was standing at Mini Bus Stop at ISBT having charas in a bag. This information was reduced into writing. The said SI organized a raiding party joining one Ashok Kumar a public witness and Constables with him; the appellant was apprehended at Mini Bus Stop ISBT on the pointing out of the informer at about 8.45 p.m. ACP who was called by the SHO also reached there and joined the raiding party. A notice under Section 50 of the Act was given to the accused but he declined to be searched in the presence of a Gazetted Officer or a Magistrate. The accused was carrying a bag. The search of his bag was taken by S.I. Ram Singh in the presence of ACP, S.H.O. police constables and the aforesaid public witness; in another polythene bag in it 8 Kgs. and 200 Gms. of charas was recovered which was seized. Sample of 200 Gms. charas was taken and the sample and the remaining charas Were converted into two separate parcels, both sealed with the seals of RS of the IO and CMI of the SHO. Form CFSL was filled in and the case property was taken into possession by S.H.O. who deposited the same in Police Malkhana and in due course CFSL report was obtained which gave positive test for charas.

3. The appellant was put to trial for charge under Section 20 of the Act. PW-2 Inspector Chander Mohan (SHO), PW-4 Mohan Kudesia (ACP), PW-5 Ashok Kumar, public witness; PW-6 Ram Singh Inspector (formerly SI); PW-7 Ct. Rajinder Singh and PW-8 Ct. Ravinder Kumar appeared and deposed as eye-witnesses about the search, recovery and arrest of the appellant, besides PW-1 the Malkhana Moharar with whom the case property was deposited and PW-3 SI Khushi Ram as Duty Officer who registered the FIR. The accused in his statement under Section 313 Cr.P.C. denied that any such contraband was recovered from his possession. He took the plea that he was a laborer coolie working at Mini Bus Stop ISBT, he was caught by the police from there, taken to the police station, falsely implicated in this case and nothing was recovered from his possession.

4. He did not lead any evidence in defense. The learned trial court believed the prosecution case, convicted and sentenced him as aforesaid.

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

6. These contentions are disputed 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 neither the notice was given to him nor the alleged notice is legal, valid and sufficient and proper notice; non-compliance of this requirement has vitiated the trial. Reliance has been placed on State of Punjab v. Balbir Singh, : 1994 CriLJ3702 and Saiyad Mohd. Saiyad Umar Saiyed and Ors. v. The State of Gujrat : 1995 CriLJ2662 .

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

'When any officer duty authorised under e 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 much more 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. The State of Gujrat : 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. Ex.PW6/A is the copy of the notice under Section 50. Whether it is a proper notice under Section 50

12. In this notice, an option is given to the effect that 'Aap Apni Talashi Kisi GO Ya MM ke same diana chathe ho to inseam ho sakta 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, takhai' (on translation 'If you desire to be searched in the presence of GO or MM, his presence can be arranged). The words 'GO' and 'MM' are the abbreviations of the words. The meaning or import of these words would not be known to a layman and even to an educated person. The accused appears to have signed this notice in Hindi and that does not show that he is a well educated person knowing English. There is nothing to show that the accused knew the meaning of these words or that he was explained what the words 'Go's' and 'MM' stood for. This notice cannot be said to give a proper notice to the accused that if he desired, he could be searched in the presence of a 'Gazetted Officer' or a 'Magistrate'.

13. SI Ram Singh PW-6 has deposed that offer was given by the ACP to the effect that if he so desired the presence of 'GO' or 'Magistrate' can be arranged, the word 'GO' being not properly understandable. PW-4 Shri Mohan Kudaisya, ACP was not among the patrolling party. He is alleged to have been called from his office by the SHO. Why he was called? It was not necessary to have joined an ACP in the raiding party nor his presence was necessary for the purpose of such raid/search. He, in his statement as PW-4, has deposed that he had told the accused that he was an ACP and a Gazetted Officer and had asked him whether he wanted to be produced before a Metropolitan Magistrate. ACP being a member of the raiding party could not be a substitute for a Gazetted Officer in whose presence the search could be made. He does not say that the option of search being made in the presence of a Gazetted Officer was also given by him. His statement casts doubt on the correctness of the notice Ex. PW-6/A and also the testimony of PW-

2, PW-6, PW-7 and PW-8 in this respect. If his , statement is accepted, only a partial option was given as it does not give the option to be searched before a Gazetted Officer. He does not corroborate PW-6 in this respect. From this documentary as well as oral evidence on record, it cannot be said that a proper notice as required under Section 50 was given. This is a mandatory provision which has not been complied. This vitiates the trial. Perhaps, presence of ACP has been shown to give credence to the search having been made in the presence of a Gazetted Officer. It could be an act of padding the prosecution case. His introduction in the search appears to have been made to avoid the search being made in the presence of an independent Gazetted Officer of the choice of the accused.

14. Service of this notice is also denied. PW-2 (SHO) has deposed that a notice Under Section 50 was given. PW-4 (ACP) in his statement in chief does not say if such a notice was given but in cross-examination he has stated that the notice was given in his presence. PW-5 public witness does not say if such a notice was given. PW-6 has deposed that the notice was given and Ex.PW-6/A is its carbon copy. PW-7 and PW-8 have also deposed that the notice was given.

15. Learned counsel for the appellant has contended that Under Section 51 of the Code of Criminal Procedure (for short 'the Code'), all articles other than the wearing clothes of the accused are required to be seized from his person at the time of his arrest and in case the notice was given, the same would also have been recovered from his personal search but it was not recovered and seized which would suggest that the notice was not served. Whereas Learned Counsel for the State has contended that the notice is not an objectionable article and it is a document which would not be seized and would re-main with the accused.

16. Admittedly, the notice was not recovered and seized from the person of the accused and it is not the article mentioned in the personal search memo Ex.PW-5/A. Assuming that the notice is not an article or something objectionable which would not be seized at the time of arrest in his personal search, but this is not the case of the prosecution as is clear from the statement of PW-6 (IX.) who, in cross-examination, has stated that 'the personal search of the accused was conducted in

the presence of the SHO and whatever was recovered from the possession of the accused it was mentioned in personal search Memo of the accused. However, the notice was (not) recovered. Vol. He might have thrown it earlier'. After the alleged notice was served, the accused remained in the custody and under the gaze of the raiding party. They must have seen if the notice was thrown by the accused. Nobody has deposed that he had seen the notice being thrown or otherwise destroyed by the accused. This circumstance shows that in all probability the notice was not actually given to the accused as alleged.

17. From this material on record it cannot be said that a notice under Section 50 was actually given to the accused or that the notice in question is a proper and valid notice under Section 50 of the Act.

18. This mandatory provision thus has not been complied with. This vitiates the trial. The finding of the Learned Trial Court in this respect in the circumstances is not reasonable, proper and justified and cannot be sustained.

19. Learned counsel has also contended that the evidence about the search and recovery is also not reliable. Regarding weights used in weighing the charas recovered, there is total inconsistency in the testimony of PWs.

20. According to PW-2, weights used were of 2 kg., 1 kg. and some weights in grams. PW-4 could not tell the weights used in weighing. Inspector Ram Singh PW-6 (I.O.) on the other hand has deposed that the weights of 500 gms., 200 gms. and 50 gms. were with him and first 1-1/2 kg. of charas was weighed, then weights were put in the other part making it weigh 3 kg. PW-7 does not remember the size of the weights used whereas PW-8 has stated that charas was weighed four times with weight of 2 kgs.

21. Normally, it cannot be said that a witness, especially a police official who might have handled several such cases during the intervening period, would remember such details after lapse of time. However, they have not so stated nor had refreshed their memory from their earlier statements. By making inconsistent statements, PW-2, PW-6 and PW-8 have made their testimony doubtful and which in turn also casts doubts on the prosecution case about this recovery.

22. Learned counsel for the appellant has also contended that the public witness PW-5 is a chance witness, his presence at the spot at the time of occurrence is not explained and is not natural; he is not a real witness of the recovery; he is also not an independent witness and is under the influence of the police and has been introduced to falsely support the prosecution story. This is disputed by learned Counsel for the respondent.

23. PW-5 Ashok Kumar is a public witness. PW-6 Inspector Ram Singh, I.O. who was heading the raiding party has deposed that while on patrolling duty along with his SHO and other police officials at Boulevard Road near ISBT at about 8.30 P.M., he received a secret information about a person haying chants standing at Mini Bus Stop at ISBT, 3-4 passersby were asked to join the raid. Out of those, Ashok Kumar agreed to join the raid and he was so joined and then he along with others had proceeded towards the place where the accused was present.

24. Obviously, according to his version, this public witness would have been joined from near the place where secret information was received, i.e., near Boulevard Road crossing, near ISBT, or in other words, from outside the complex of ISBT.

25. PW-7 and PW-8 have also so deposed. Ashok Kumar appeared as PW-5. He is residing near GPO, Kashmere Gate. He deposed that he was going to ISBT and at about 8.30 P.M., one police person had caught the accused. He has not stated where he has joined the raiding party. In cross-examination, he has stated that he has been selling factories on a 'rehri' at a distance of about one km. from the place of this incident. The exact location of that place is not known. The purpose of his being present or going to ISBT is not disclosed. It is also not disclosed wherefrom he had come to go to ISBT. If he had come from his house, that is, from GPO side, then there would have been no occasion for him to have gone towards Boulevard Road as ISBT is on the way. He has also not stated that he was coming from the Northern side of Boulevard Road and if so from where, for going to the ISBT. The purpose of his presence at the time and place of recovery has not been explained.

26. He is a chance witness. Though a chance witness is not necessarily a false witness, but it is proverbially unsafe to rely upon his testimony. His evidence requires cautious and close scrutiny Bahal Singh v. State of Haryana : 1976

CriLJ1568].

27. The question also is whether he is an independent witness and not under the influence of the police. In cross-examination, he has stated that he sells factories on rehri, perhaps in the area of the Police Station Kashmere Gate, he knew police officials and he also used to supply articles to the police officials in the police station. He has also admitted that the police challans the rehriwall as if they ply the rehries at one place. In the circumstances, it cannot be said that he is an independent witness and not under the influence of the police, i.e., the raiding party.

28. The charas alleged to have been recovered was not weighed in his presence its he has stated that he did not know where it was weighed by the police. All other witnesses of recovery (PW-2, PW-4, PW-6, PW-7 and PW-8) have deposed that it was weighed at the spot. Had it been weighed at spot and he was present there, he would have seen it and deposed so. In that view, his presence at the spot is very doubtful. He thus also cannot be said to be a reliable and trustworthy witness of the recovery.

29. As already noticed, presence of the ACP is not necessary at the time of such search and in all probability he has been introduced to give a colour of credence to the prosecution case.

30. In these circumstances, the prosecution case does not inspire confidence and it would not be safe to sustain the conviction on the basis of the evidence on record. The learned Trial Court has not considered the material circumstances of the case before coming to the finding of conviction. In the circumstances, the conviction cannot be upheld.

31. This appeal is accordingly allowed. Conviction and sentence of the appellant are set aside and he is acquitted of the offence with which he has been charged. He shall be released forthwith, if not required in any other case.

32. Jail authorities be informed forthwith.

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