

Mithukhan Vs. State of Rajasthan

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Court : Rajasthan

Decided On : Feb-20-1968

Reported in : AIR1969Raj121; 1969CriLJ515

Judge : C.B. Bhargava, J.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 52, 97 and 99; ;[Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 165 and 165(1); [Opium Act, 1878](#) - Sections 14, 15 and 16

Appeal No. : Criminal Revn. No. 278 of 1967

Appellant : Mithukhan

Respondent : State of Rajasthan

Advocate for Def. : M.L. Shrimal, Adv.

Advocate for Pet/Ap. : R.N. Surolia, Adv.

Disposition : Petition allowed

Judgement :

ORDER

C.B. Bhargava, J.

1. This is an application in revision by Mithukhan against his conviction under Sections 332 and 353 of the Indian Penal Code.

2. The case of the prosecution is that on 31st October 1963, at about 7 p.m. Shri Govind Gurnani, Inspector Narcotics on the information of an informer that the petitioner had contraband opium in his house, reached there along with members of his party. The petitioner was then present at his house. Panchas were called and his house was surrounded and while the search party was attempting to enter the house, the petitioner resisted the attempt and struck lathi blows on Amir Mohd. Constable and Shafiq Ahmed, the informer, and thus the attempt of the raiding party to enter the petitioner's house was frustrated. Shri Gurnani called help from the police. But by the time the police arrived the petitioner had escaped.

Thereafter search of the house was taken by Shri Gurnani with the help of the police, but nothing incriminating was found inside the house. It is said that Yasinkhan son of the petitioner removed the lathi with which the constable and the informer were assaulted with the intention of screening the offender from legal punishment. On these facts the petitioner and his son were prosecuted the latter under Section 201 of the Indian Penal Code.

A number of witnesses were examined on behalf of the prosecution and the trial Magistrate found the petitioner as well as his son guilty of the offences with which they were charged. On appeal the learned Sessions Judge, Kota acquitted the petitioner's son of the offence under Section 201 of the Indian Penal Code, but maintained the conviction and sentences passed on the petitioner by the trial court.

3. In this court learned counsel for the petitioner has urged that according to Section 16 of the [Opium Act, 1878](#) (hereinafter called the Act), all searches under Section 14 or 15 are to be made in accordance with the provisions of the Code of Criminal Procedure. Section 14 of the Act empowers officers of the Central Excise, Narcotics, Drugs Control, Customs, Revenue, Police or Excise, superior in rank to a person or constable, authorised in this behalf by the Central Government, to enter, arrest and seize on information opium unlawfully kept in any enclosed place. But in view of the provisions of Section 16 of the Act, the procedure laid down

under the Code of Criminal Procedure is required to be followed by the officers mentioned in Section 14.

It is urged by the learned counsel that in the present case the Inspector of Narcotics did not comply with the provisions of Sub-sections (1) and (5) of Section 165 of the Code of Criminal Procedure which are mandatory in nature and whose non-compliance rendered the search illegal. Therefore, the petitioner was entitled to defend his property when attempt was made by the raiding party to enter his house where his females also resided. Reliance is placed in this connection on *State of Rajasthan v. Rehman*, AIR 1960 SC 210 and it is pointed out that Rule 201 of the Central Excise Act, contains provisions similar to sections 14 and 16 of the Act respectively and while considering the provisions under the Central Excise Act the Supreme Court held that 'provisions of section 165 of the Code of Criminal Procedure must be followed in the matter of searches under rule 201 of the Rules and a search where provisions of Section 165 are ignored, would be a search made in contravention of the provisions of the Code and would be illegal.'

On the authority of this case it is urged by the learned counsel that under the Opium Act too if the officer authorised under section 14 of the Act taking the search does not comply with the provisions of section 165 of the Code of Criminal Procedure, the search would be illegal and if any resistance has been, offered during the course of that search and members of the raiding party have even been assaulted, they would be protected under section 97 of the Indian Penal Code as exercising the right of private defence of property.

4. It is undoubtedly true that Shri Gurnanj did not comply with the provisions of Section 165 (1) of the Code inasmuch as he failed to record in writing the grounds of his belief and specifying therein the thing for which search was to be made. On behalf of the prosecution nothing has been brought on the record to show that the above requirement ?? law was complied with. As already stated, under the Act all searches are to be made according to the procedure laid down in the Code of Criminal Procedure which included section 165 also and in view of the pronouncement of the Supreme Court mentioned above, it becomes clear beyond any shadow of doubt that the search was being made by Shri Gurnani in

contravention of section 165 (1) of the Code.

5. There is also no doubt that the acts of the raiding party clearly amounted to an attempt to commit criminal trespass inasmuch as they had clearly expressed their intention to take the search of the petitioner's house, had surrounded it and were about to enter it when this assault is said to have been made by the petitioner. In view of these facts there is no doubt that Section 97 of the Indian Penal Code comes to the rescue of the petitioner and he can claim right of private defence of property.

6. On behalf of the State learned Deputy Government Advocate has claimed the benefit of Section 99 of the Indian Penal Code for the members of the raiding party. He urges that in the Supreme Court case cited above this question was left open whether absence to record reasons under Section 165 (1) of the Code was merely an irregularity and would give right to the petitioner to prevent the officer from making search. He says that the right of private defence under Section 97 of the Indian Penal Code is subject to Section 99 of the Indian Penal Code and because Shri Gurnani who was a public servant was acting in good faith under colour of his office and the act committed by him did not reasonably cause the apprehension of death or of grievous hurt, the petitioner had no right of private defence of property even though the act of such public servant was not strictly justifiable by law.

In my opinion the contention has no force because as laid down in Section 52 of the Indian Penal Code nothing is said to be done or believed in 'good faith' which is done or believed without due care and attention. The public servants who are empowered to take search under Section 14 of the Act. are presumed to know the law and if the act is done in contravention of the mandatory provisions of law it must be held to have been done without due care and attention and cannot be said to be done in good faith. That being so Section 99 of the Indian Penal Code does not come to the aid of the Inspector or the members of his party who were attempting to enter the petitioner's house for taking search.

In support of his contention learned Deputy Government Advocate also invited my attention to Maingal Singh v. Ghulam Mohammad. AIR 1939 Lah 280. But that

case was noticed in a subsequent decision of that Court in Emperor v. Mohammad Shah, AIR 1946 Lah 456. and it was held that 'it is difficult to say that a police officer who carries out a search under Section 165, Criminal Procedure Code without complying with the safeguards incorporated in that section Which were undoubtedly intended by the legislature to be mandatory, is acting with due care and attention.' AIR 1935 Nag 237 and 45 Cr LJ 802 = (AIR 1944 Pat 228) were also relied on in that iudg-ment. It was further held in that case that 'the simple safeguards incorporated by the Legislature in Section 165, Criminal PC, are mandatory, not directory, and must be carried out immediately and fully, or as nearly so as they can be in the exigencies and circumstances of each case. Unless this is done the search is without jurisdiction and bad in law. Section 99, Penal Code, will in no way cure this, for the Police officer who carries out a search under Section 165, Criminal PC. without complying with its requirements, which are intended to be mandatory is acting without due care and attention.'

There are also decisions of other High Courts to the same effect which need not be cited. I am therefore of the view that no offence was committed by the petitioner in assaulting the constable and the informer when they were attempting to enter the house of the petitioner for search without following the procedure laid down under Section 165 (1) of the Code,

7. The revision is therefore, allowed, conviction and sentences passed on the petitioner are set aside and he is acquitted. He is on bail. He need not surrender to it. His bail bonds are cancelled. Fine if paid by him shall be refunded.

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