

Ayub Vs. State of Rajasthan

Ayub Vs. State of Rajasthan

SooperKanoon Citation : sooperkanoon.com/758226

Court : Rajasthan

Decided On : Apr-04-1997

Reported in : 1998CriLJ132

Judge : S.C. Mital, J.

Acts : [Narcotic Drugs and Psychotropic Substances Act, 1985](#) - Sections 8, 18, 42, 42(2) and 50; Code of Criminal Procedure (CrPC) - Sections 313

Appeal No. : S.B. CrI. Appeal No. 157/1996

Appellant : Ayub

Respondent : State of Rajasthan

Advocate for Def. : R.S. Rathore, PP

Advocate for Pet/Ap. : R.K. Charan, Adv.

Disposition : Appeal allowed

Judgement :

S.C. Mital, J.

1. This appeal arises out of the judgment of conviction and sentence under Section 8/18 of the Narcotic Drugs & Psychotropic Substances Act, 1985 (hereinafter referred to as Act, 1985) passed against the appellant in Sessions

Case No. 178/94. The appellant has been sentenced to 10 years rigorous imprisonment and Rs. 1,00,000/- fine and in default to further suffer 2 years rigorous imprisonment.

2. Briefly stated the prosecution case is that Shri Azad Kumar Sharma, Dy. S. P., Bhilwara received source information during the night 20-3-94 and 21 -3-1994 that a person with opium in his possession was present at the bus stand. The information was reduced into writing as Ex. P. 3. Dy. S. P. Shri Azad Kumar Sharma went to the Bus Stand with two motbirs and saw a person out side the enquiry office of the Bus Stand with a black coloured bag in his right' hand. On interrogation, he disclosed his name as Ayub Khan son of Rula Ji Musalman Gujar, resident of Bapoli, District, Panipat (Haryana). He was informed about his right to be searched in the presence of a Gazetted Officer or a Magistrate under Section 50 of the Act, 1985 through memo Ex. P4. The appellant accused gave his consent for search by the Dy. S. P. Dy. S. P. Shri Azad Kumar Sharma conducted search in the presence of the motbirs and found 1 Kg. and 900 Gms. contraband opium in a bag in the possession of the appellant accused. Two samples of 30 Gms. each were taken on the spot and duly sealed and the remaining opium was also sealed in a bag. A F.I.R. was also lodged against the appellant by Dy. S. P. Shri Azad Kumar Sharma on 21 -3-94 at Police Station, Subhash Nagar and a case under Section 8/18 of the Act, 1985 was investigated and after usual investigation a challan was filed against the appellant on receiving the report from Forensic Science Laboratory, Rajasthan, Jaipur that the material in the sealed packet was contraband opium.

3. The appellant denied the charge framed against him under Section 8/18 of the Act, 1985. He stated in his statement under Section 313, Cr. P.C. that the facts disclosed by the prosecution are wrong and no opium was recovered from him. The learned Special Judge after hearing the parties and appraisal of the evidence on record, recorded the conviction and sentence as indicated above.

4. The learned counsel for the appellant has raised the argument that the information recorded under Section 42 in the shape of Ex. P. 3 was not communicated to the superior officer as envisaged in Sub-section (2) of Section 42

of the Act, 1985. There is total non-compliance of the mandatory provisions of Section 42(2) of the Act, 1985 and it vitiates the conviction and sentence passed against the appellant.

5. The learned Public Prosecutor has contended that Section 42 does not come into play in the facts and circumstances of this case, because the recovery has been effected from a public place i.e. the bus stand.

6. I have given my earnest consideration to the rival contentions. The learned trial Court has also considered this contention and took the view that Section 42 of the Act, 1985 is not applicable because the recovery of contraband opium has been made from an open place. Section 42 of the Act, 1985 postulates that if the authorised officer has reason to believe from personal knowledge or through an information by any person and taken down in writing that an offence punishable under Chapter IV has been committed in respect of any narcotic drug, or psychotropic substance, he may seize such drug or substance and detain, search and also arrest any person whom he has reason to believe to have committed such offence relating to such drug or substance. Section 43 makes a provision for seizure of any narcotic drug or psychotropic substance in respect of which offence punishable under Chapter IV has been committed and also to seize the conveyance used or any document or other article, which may furnish evidence of the commission of such offence and also to detain, search and arrest any person who has committed such offence in respect of any narcotic drug or psychotropic substance and has unlawful possession of such contraband Article in a public place. If the recovery is effected from public place, the provisions of Section 42 in respect of recording the information and forwarding the copy of the same forthwith to officer superior are not applicable.

7. Therefore, the question arises whether the recovery has been effected from public place in the instant case. The accused appellant was found present at the bus stand and his search was taken there resulting in the recovery of the alleged contraband opium 1 Kg. and 900 gms. from the bag in his hand. Therefore the allegation is that the accused committed an offence punishable under Chapter IV in respect of narcotic drug and psychotropic substance for which Shri Azad Kumar

Sharma, Dy. S. P. received prior source information and he proceeded to conduct the operation. I am of the view that the recovery cannot be held to have been made from a public place because the accused was standing at the bus stand, but it was made from his person on the basis of prior source information. Therefore Section 42 of the Act, 1985 is applicable in this case. The prior source information has been recorded as Ex. P. 3, but it is a undisputed fact that the copy of this information has not been communicated forthwith to the immediate officer superiorly Dy. S. P. Shri Azad Kumar Sharma. I have perused the statements of Azad Kumar Sharma (P.W. 10), Jagdish Chandra, A.S.I. (P.W. 9) and Kanhaiya Lal, Constable (P.W. 1). It is evident from the above statements and the documents on the record that copy of Ex. P. 3 has not been forwarded at all to the official superior. It is established that the mandatory provisions of Section 42(2) of the Act, 1985 have not been complied with, which vitiates the conviction of the appellant. The appeal deserves to be allowed on this score alone and I do not deem it necessary to discuss the evidence and the other contentions put forth on behalf of the appellant'.

8. In the result this appeal is allowed and the impugned judgment of conviction and sentence against the appellant dated 15-1-1996 passed by the learned Special Judge, N.D.P.S. Cases, Bhilwara hereby set aside. He is acquitted of the charge under Section 8 read with 18 of the Narcotic Drugs & Psychotropic Substances Act, 1985. He shall be released forthwith, if not required in any other case.