

State of Rajasthan Vs. Mohanlal

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Court : Rajasthan

Decided On : Nov-01-1996

Reported in : 1997CriLJ1091

Judge : J.C. Verma, J.

Acts : [Narcotic Drugs and Psychotropic Substances Act, 1985](#) - Sections 17, 42 and 42(1); Foreign Exchange Regulation Act - Sections 37(2); Code of Criminal Procedure (CrPC) - Sections 165, 165(5), 397 and 401

Appeal No. : Criminal Revn. Petn. No. 119 of 1988

Appellant : State of Rajasthan

Respondent : Mohanlal

Advocate for Def. : M.C. Bishnoi, Adv.

Advocate for Pet/Ap. : U.C.S. Singhvi, Public Prosecutor

Disposition : Revision dismissed

Judgement :

ORDER

J.C. Verma, J.

1. This criminal revision has been filed by the State under Section 397/401 of Cr.P.C. against the judgment dated 2-2-88 passed by the learned Sessions Judge, Balotra, whereby learned Sessions Judge had declined to take cognizance against accused Mohanlal and had discharged him without proceeding with the case of the prosecution any further. The learned Sessions Judge while passing the impugned order had held that the action taken under Section 42 of the [Narcotic Drugs and Psychotropic Substances Act, 1985](#) (hereinafter called 'the N.D.P.S. Act') had not been taken by the empowered officer under the Act and therefore whole of the proceedings were ineffective and illegal and the prosecution started on the initiation of such an officer, who was not empowered under the Act to initiate proceedings were to be quashed.

2. The facts, leading to the case to be tried in connection with Section 17 of N.D.P.S. Act, were, that one Prabhu Singh, A.S.I, who had taken action under Section 42 of the N.D.P.S. Act was neither the S.H.O. nor the Inspector in any police station. On 29-3-87 this Prabhu Singh, A.S.I, had searched and arrested Mohanlal accused on the suspicion for carrying 'Ganja' weighing about 900 grams. He had not only searched and arrested but also had investigated the case and prepared the site plan and had sent the samples to the laboratory. He had even been prosecuting the case in the court as well, by asking for remand of the accused on various dates under his own signatures. The charge-sheet itself was also presented to the Court under the signature of the said A.S.I. Prabhu Singh. The recovery was made by him and all the relevant proceedings had also been conducted by Prabhu Singh, A.S.I. The learned Sessions Judge had further held that right from the search made under Section 42 of the N.D.P.S. Act upto submitting of challan, A.S.I. Prabhu Singh had investigated the case. Admittedly, Prabhu Singh, A.S.I, was never appointed as S.H.O. at Balotra Police Station.

3. Under the provision of Section 42 of the N.D.P.S. Act only those officers are empowered to take action under Section 42 of the Act, who are either Inspectors or S.H.O. or appointed as S.H.O. It is admitted case of the parties that A.S.I. Prabhu Singh was neither Inspector nor S.H.O. at the time of initiation of proceedings, and was not empowered officer under Section 42 of the Act and as such, the proceedings taken by Prabhu Singh were vitiated as void-ab-initio, thus,

quashing the trial from the very beginning including charge-sheet, it was so held by the Trial Judge.

4. Being aggrieved by this order, the State has filed present criminal revision.

5. The main ground for attack against the order of the learned Sessions Judge is that the provisions of Section 42 of the NDPS Act are not that mandatory as to vitiate the proceedings itself. To support his contention, the learned counsel appearing for the State has relied on AIR 1985 SC 989 : 1986 Cri LJ 824 (Dr. Partap Singh v. Director of Enforcement, Foreign Exchange Regulation Act), on the proposition as to how the search is to be made by the Officer concerned. In that case Section 37(2) of the Foreign Exchange Regulation Act provided that the provisions of the Code of Criminal Procedure, relating to searches, shall, so far as may be, apply to searches under this section, subject to the modification that Sub-section (5) of Section 165 of the said Code shall have effect as if for the words 'Magistrate', wherever it occurs, the words 'Director of Enforcement or other officer exercising his power' is substituted. It was submitted that if the power to search premises is conferred on the officer therein mentioned, it is hedged in with a condition that in exercise of the power he is bound by the requirements of Section 165 of the Code and any violation of search and seizure provisions shall not vitiate the action of the prosecution. The facts and circumstances in Partap Singh's case (supra) were different and hence the authority quoted by the learned counsel appearing for the State is not helpful.

6. On the other hand, the learned counsel for the respondents relies on the case of this High Court reported in (1987) 3 Crimes 629. It was held that Head Constable/A.S.I. was not authorised to carry out search and arrest under Section 42 of the Act. It was further held as under:

I have carefully gone through the cases cited above and have no hesitation in reaching the conclusion that for launching the prosecution or for initiating the proceedings the authority doing so must have a clear and unambiguous power. In criminal cases while enacting such provision the legislature puts a complete ban on the authorities beyond one mentioned in the Section to carry out the functions under the Act. In Section 42 of the Act the legislature has clearly empowered the

persons mentioned therein or who are authorised to do so by notification. The legislature intended that a peon, sepoy or constable should in no case be empowered to enter search or seize or arrest a person without warrant. It also did not empower in the Act even the police officers unless there was a notification in that behalf and as quoted by me above the officers of the police department had been empowered only by notification, dated Oct. 16, 1986 and thereto the Government authorised the Inspectors of Police and Sub-Inspectors of police who too were posted as Station House Officers a person accused of a crime particularly like the one where the legislature provides a minimum sentence of ten years and a fine of Rs. 1,00,000/-, it is essential that the intention of the legislature must be carried out in letter and spirit. The accused has a right to expect a fair investigation and a fair trial keeping in view the basic concept that justice should not only be done but it should appear to have been done, has facing a trial by itself as an ordeal. A Head Constable is also a constable and is certainly not a Sub-Inspector or Inspector of Police and in the instant case PW-1 Amanulla Khan was admittedly not Station House Officer of G.R.P. Police Station, Ajmer. I have also quoted his statement in extenso where he has admitted that he had gone to the police Station after ten minutes of the search of which he had no jurisdiction express or implied. Even the SHO, PW-6, Ram Chandra had no jurisdiction vested in him on November 21, 1985 and as such very foundation of the case is without proper authority of law. I need not go into other points raised as this alone is sufficient to dispose of this case.

7. Similar view was taken by another bench of this Court in *Shanti Lal v. State of Raj* reported in (1989) 1 Crimes, 276.

8. In the present case, it is admitted fact that notification was published in Rajasthan Gazette on 16-10-86 which is reproduced as under :

(III) Published in the Rajasthan Gazette, Extra, Part IV-C(II) dated Oct. 16th, 1986 at p.269. No. F.I(3) FD/Ex/85-1, dated 16-10-86.

S.O.I 15.- In exercise of the powers conferred by Section 42 of the [Narcotic Drugs and Psychotropic Substances Act, 1985](#) (Act No. 61 of 1985) the State Government hereby authorise all inspectors of police, and sub-inspectors of

police, posted as Station House Officers, to exercise the powers mentioned in Section 42 of the said Act with immediate effect: Provided that when power is exercised by police officer other than police Inspector of the area concerned such officer shall immediately hand over the person arrested and articles seized to the concerned police Inspector or S.H.O. of the Police Station concerned.

9. Under the above said notification, the only officers who were empowered to take action under the NDPS Act, were specified as Inspector of Police and Sub-Inspector of Police posted as S.H.O's and none else. The above view has been fully approved by the Apex Court in the case of State of Punjab v. Balbir Singh AIR 1994 SC 1872 : 1994 Cri LJ 3702. The object of NDPS Act is to make stringent provisions for control and regulation of operations relating to those drugs and substances. At the same time, to avoid harm to the innocent persons and to avoid abuse of the provisions by the officers, certain safeguards are provided which in the context have to be observed strictly. Therefore, these provisions make it obligatory that such of those officers mentioned therein, on receiving an information, should reduce the same to writing and also record reasons for the belief while carrying out arrest or search as provided under the provisions to Section 42(1). To that extent they are mandatory. Consequently, the failure to comply with these requirements thus affects the prosecution case and therefore vitiates the trial.

10. Chapter V specifically provides only the officers mentioned and empowered therein can give an authorisation to a subordinate to arrest and search if such officer has reason to believe about the commission of an offence and after reducing the information, if any, into writing. Under Section 42 only officers mentioned therein and so empowered can make the arrest or search as provided if they have reason to believe from personal knowledge or information. In both these provisions. there are two important requirements. One is that the Magistrate or the Officers mentioned therein firstly be empowered and they must have reason to believe that an offence under Chapter IV has been committed or that such arrest or search was necessary for other purposes mentioned in the provision. So far as the first requirement is concerned, it can be seen that the Legislature intended that only certain Magistrates and certain Officers of higher rank and empowered can

act to effect the arrest or search. This is safeguard provided having regard to the deterrent sentences contemplated and with a view that innocent persons are not harassed. Therefore, if an arrest or search contemplated under these provisions of NDPS 'Act has to be carried out, the same can be done only by competent and empowered Magistrates or Officers mentioned thereunder.

11. The Hon'ble Supreme Court in *State of Punjab v. Balbir Singh* 1994 Cri LJ 3702 (Supra) had categorically held that if an arrest or search contemplated under Sees. 41 and 42 is made under a warrant issued by any other Magistrate or is made by any Officer not empowered or authorised, it would per se be illegal and would affect the prosecution case and consequently vitiate the trial.

12. The learned counsel for the accused submits that in any case, the period of about 9 years has passed from the date of incident and it will be highly unjust, if the accused are sent for trial after such a long period. In normal course, in the peculiar facts and circumstances of the case, this contention would have been acceptable, but because of the reason that revision petition of the State is being dismissed, there is hardly any need to go into the matter.

13. For the reasons mentioned above, and in view of the consistent view of this Court and Hon'ble Apex Court, no fault can be found in the order of learned Sessions Judge. The revision petition is, therefore, dismissed.