

Bashir and ors. Vs. State of Rajasthan

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SooperKanoon Citation : sooperkanoon.com/763108

Court : Rajasthan

Decided On : Sep-30-1996

Reported in : 1997(1)WLC202; 1996(2)WLN161

Judge : S.C. Mital, J.

Appeal No. : S.B. Cr. Appeal No. 472 of 1995

Appellant : Bashir and ors.

Respondent : State of Rajasthan

Judgement :

S.C. Mital, J.

1. The appellants have been convicted under Sections 21 and 29 of Narcotic Drugs and Psychotropic Substances Act, 1985 (in short NDPS Act) and sentenced to undergo 10 years R.I. and a fine of Rs. 1,00,000/- or in default to undergo two years RI on each count by judgment dt. 21.10.95 passed by learned Special Judge NDPS Act Cases, Jodhpur. The appellant Radheyshyam has been further convicted under Section 25 of NDPS Act, 1985 and sentenced to undergo 10 years R.I. and a fine of Rs. 1,00,000/- or in default to under two years R.I. All the substantive sentences against the appellants shall run concurrently.

2. SHO Khanda Falsa Shri Ashwani Kumar received source information on 9.12.94 that Hazi Saradeen resident of Kundal will reach from Pakistan after taking heroine from Phalodi to Soorsagar in a commander Jeep No. RJ-19 C-3934. The information was sent to CO. Shri Shorabh Srivastava who come to the police station and directed Devaram Constable to summon two motbirs and to report on duty near Gangelav Talab on New Chandpole Road. SHO Khanda Falsa and CO. Shri Shorabh Shrivastava with police party arranged a Nakabahdi at about 1.07 Am. SHO Khanda Falsa informed on wireless that a jeep is coming with 'Jaidurga Phalodi' written in bold letters on stepney. CO. Shri Shorabh Shrivastava stopped the commander jeep coming from the side of Chandpole Road and a person with a gun jumped out of the jeep and tried to run away but fell down. Bhaggram and Ramesh Kumar chased that person. Motbirs could not be available during the night. Appellant No. 2 Radheshyam was driving the jeep and appellant No. 1 and 3 were sitting in the jeep and on inquiry gave the name of the person who ran away- Saradeen the father of the appellants No. 1 and 3. Heroine 1 Kg was recovered from the folds of Tehmad of appellant Mohammed on his Jama Talasi. The tool box below the driver seat was opened and 950 gms heroine was recovered in a packet. All the necessary documents were prepared and the appellants were arrested on the spot. After completing usual investigation, challan was filed against the appellant and the investigation against Saradeen was kept pending under Section 173(8) Cr.P.C.

3. The appellants denied the charges. The prosecution and defence witnesses were recorded and after hearing the parties and perusing the evidence on record the impugned judgment and sentence as stated above was passed by learned Special Judge.

4. Two folds arguments have been made on behalf of the appellants challenging the conviction and the sentence. Firstly, it is contended that the search and seizure was made between sun set and sun rise from the conveyance i.e. commander jeep without obtaining warrant for search and seizure but the grounds of belief that search warrant or authorisation cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender have not been recorded by the empowered officer. Therefore, it is non

compliance of mandatory provision of Section 42 of NDPS Act which vitiates the conviction. Secondly, it is argued that the prosecution has failed to prove that the samples sealed on the spot remained intact and sealed throughout from the date of seizure to the date these were deposited for chemical examination in Forensic Science Laboratory Jaipur. In view of this it is contended that it is not proved beyond reasonable doubt that FSL report Ex.P.21 relates to the articles alleged to have been recovered from the appellants. Learned Public Prosecutor has supported the impugned judgment that the provisions of Section 42 of NDPS Act have been complied with and by producing all link evidence, it has been proved that samples were not tampered with. The memo seal of impression was sent alongwith samples and as revealed from forwarding letter Ex.P. 19 and the seal on the samples was fallied with the specimen seal impression which is clearly mentioned in the report Ex.P.21. Learned Counsel for the appellants relied upon 1994 Cr.L.J. SC 3702 (State of Punjab v. Balbir Singh).

5. It has been held in State of Punjab v. Balbir Singh (supra) that the provisions contained in Section 42 NDPS Act are mandatory in nature and its non compliance vitiates the trial. Section 42 NDPS Act authorises the empowered officer to enter into and search building, conveyance or enclosed place, break open any door or remove obstacle to enter in case of resistance, seize the article and all materials and conveyance and document and to detain and search and if thinks proper to arrest any person whom he has reason to believe to have committed any offence punishable under chapter IV relating to such drug or substance. This provision also mandates that the empowered officer shall take down in writing the information given by any person about commission of the offence under chapter IV of NDPS Act and Sub-sec Jon 2 of Section 42 of NDPS Act makes it imperative to send forthwith a copy thereof to his immediate official superior. If the empowered officer wants to enter and search a building, conveyance or enclosed place at any time between sun set and sun rise then he should obtain--search warrant or authorisation. However, there is proviso engrafted in Section 42 of NDPS Act that if a search warrant or authorisation cannot be obtained without affording opportunity for the concealment of the evidence or facility for the escape of an offender then the empowered officer shall record the grounds of his belief with regard to above situation and thereafter he may enter and conduct search of such

building, conveyance or enclosed place between sun set and sun rise. It would be worthwhile to reproduce the relevant provision-

42(1)....

Provided that if such officer has reason to believe that a search warrant or authorisation cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search building, conveyance or enclosed place at any time between sunset and sunrise after recording the grounds of his belief.

(2) Where an officer takes down any information in writing under Sub-section (1) or records grounds for his belief under the proviso thereto, he shall forthwith send a copy thereof to his immediate official superior.

Sub--section (2) of Section 42 of NDPS Act makes it obligatory on the empowered officer to send forthwith a copy of grounds for his belief under the proviso to his immediate official superior.

6. In the present case it is indisputable that search and seizure has been effected from a conveyance commander jeep and between sunset and sun rise. It was, therefore, mandatory on the part of the empowered officer Under Section 42 (1) proviso (2) to record grounds for his belief that a search warrant or authorisation could not be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender. Without recording the grounds of such belief, the act of search and seizure by the empowered officer is unauthorised and in violation of the mandatory provisions of Section 42 of NDPS Act. In the present case, grounds for such belief have not been recorded and consequently no compliance of Sub-section (2) of Section 42 of NDPS Act was made by the empowered officer. The non compliance of this mandatory provision vitiates the conviction of the appellants.

7. It is surprising to note that the prosecution has not proved that seal impression memo bearing the signature of empowered officer and the appellants as well as motbirs if any was prepared at the time of seizure and sealing of the samples.

Seizure memos exhibited as Ex.P-4 to P-6 bear the seal impression but it nowhere discloses any seal impression memo was prepared on the spot. The prosecution has not even produced before the court and exhibited the seal impression/paper/memo which is said to have been sent alongwith samples and the forwarding letter to FSL, Jaipur. It is true that the forwarding letter Ex.P.-19 shows in the list of enclosures that the seal impression letter was sent to FSL, Jaipur. FSL report Ex.P.-21 stated in a printed line that seal of the samples was tallied with the specimen seal impression forwarded and the seals were intact. Learned Public Prosecutor strenuously argued that the statements of witnesses relating to this link evidence and Ex.P.-19 and P-21 clearly proved that tampering of the samples has been ruled out and seal impression letter has been sent and seals on the sample tallied with the specimen seal. I have bestowed my serious consideration to the contention put forward by learned Public Prosecutor but I am unable to uphold this contention because the prosecution should prove on the record of the case that the seal impression memo was prepared on the spot bearing the impression of the same seal which was used to seal the samples taken from the articles alleged to have been recovered from the accused persons in the presence of the motbirs. The seal impression memo if prepared could be filed in the court for its perusal and it should be proved that one copy of such impression seal sent to FSL, Jaipur for tallying the seal on the sample. It is not clear from FSL report Ex.P-21 that from which seal impression seals on the samples were tallied because that seal impression memo has not been placed and proved on record. The prosecution has not assigned any reason for not preparing seal impression memo at the time of seizure and sealing of the sample and also for not placing on the file of this case the copy of the seal impression memo. It is not sufficient compliance to put seal impression on the seizure memos because the seals on the samples are always tallied by the seal impression memo separately sent alongwith samples. In view of this, I am not persuaded to accept the contention of learned Public Prosecutor that a seizure memos bearing the seal impression has been sent to FSL, the seal on the samples tallying with the seal impression of such memos and therefore no doubt could be entertained about tampering with the seals of samples. The statements of the witnesses trying to prove link evidence is of no avail in the absence of the vital and material document

i.e. seal impression memo which is sent to FSL and seals on the samples are tallied with it. I agree with the learned Counsel for the appellants that the prosecution has failed to prove that the seals on the samples remained intact and were not tampered with until the samples were deposited at FSL, Jaipur. It has not been established that the samples which have been examined by FSL, Jaipur contained the same article which was sealed on the spot out of the article allegedly, recovered from the appellants. Therefore on the basis of this report EX.P-21. I do not find it safe to base conviction of the appellants. Learned trial court did not discuss the evidence in the case in the light of above aspects of the case. In view of the above discussion, I am unable to agree with the findings of the learned trial court and the conviction and the sentence passed in the impugned judgment.

8. In the result, the appeal is hereby accepted. The impugned judgment dt. 21.10.95 passed by Special Judge, NDPS Act Cases, Jodhpur is hereby set aside. The appellants Bashir, Radheyshyam and Mohmmad are hereby acquitted of the offences Under Section 21 and 29 of NDPS Act, 1985. The appellant Radheyshyam is further acquitted of the offence Under Section 25 of NDPS Act. The appellants be released forthwith if not required in any other case.