

Harchand Vs. State of Rajasthan

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Court : Rajasthan

Decided On : Jul-12-2006

Reported in : RLW2006(4)Raj3000; 2006(1)WLC332

Judge : Gopal Krishan Vyas, J.

Acts : [Narcotic Drugs and Psychotropic Substances Act, 1985](#) - Sections 8, 18, 42, 43, 49 and 57; Code of Criminal Procedure (CrPC) - Sections 161 and 313

Appeal No. : S.B. Criminal Appeal No. 492 of 1987

Appellant : Harchand

Respondent : State of Rajasthan

Advocate for Def. : L.R. Upadhyaya, P.P.

Advocate for Pet/Ap. : Pritam Solanki, Adv.

Disposition : Appeal allowed

Judgement :

Gopal Krishan Vyas, J.

1. This appeal is directed against the judgment passed by the learned Sessions Judge, Jalore in Sessions Case No. 28/87 on 26.11.1987 whereby the learned trial Judge has convicted the appellant for committing offence under Section 8/18,

Narcotic Drugs & Psychotropic Substances Act, 1985 (in short, 'the Act' herein after) and sentenced him to undergo rigorous imprisonment for 10 years and pay a fine of Rs. 1,00,000/-, in default of payment of fine to further undergo rigorous imprisonment for one year.

2. As per the facts of the case, PW.I Guman Singh, A.S.I., Police Station Chitalwana received information through informer that some person is carrying opium on the camel going to Barmer from the side of village Sangrawa. Upon that information, PW.I Guman Singh, A.S.I. Alongwith Head Constable Jalam Singh and other Constables Mangal Singh, Nathu Singh, Harlal and Lakha Ram went towards the way from Sangrawa to Barmer. As per the prosecution story, after some time, they saw a stranger riding a camel who turned back on seeing the police party, they stopped him and asked him about his whereabouts. The stranger told them his name to be Harchand Jat, resident of village Sisawa. It is stated that at the camel-saddle a green coloured raxin bag was hanging in which, upon opening, two bags were found. In one bag of white colour, 2.200 kg of opium milk was found and in one green coloured bag 2 kg of opium milk was found. A sample of 30 gm was taken from each bag and rest of the material was separately sealed. After aforesaid recovery, FIR was registered and investigation commenced for offence under Section 8/18 of the Act. After investigation, challan was filed by the S.H.O., Police Station Chitalwana before Munsiff and Judl. Magistrate, Sanchore who committed the case to the Sessions Judge, Jalore. After trial, the learned trial Judge found the appellant guilty for committing offence under Section 8/18 of the Act and convicted him accordingly. The appellant was sentenced as noted above.

3. At the trial, the prosecution led evidence of PW.I Guman Singh, PW.2 Narain Singh, PW.3 Bhura Ram, PW. 4 Jalam Singh and PW. 5 Mohammed Ramzan to prove its case. After recording statements of the prosecution witnesses the trial Court recorded statement of the accused under Section 313, Cr. P.C. in which the appellant refuted the entire prosecution evidence and specifically said that no recovery was made from him, the camel did not belong to him upon which the said opium was being allegedly carried and he was forcibly brought to the police station where all the documents were prepared. At the trial, PW. 3 Bhura Ram and PW. 5

Mohammed Ramzan were declared hostile by the prosecution. However, the learned trial Judge believed the testimony of rest of the prosecution witnesses for recording the conclusion of guilt against the appellant. It may significantly be mentioned that the prosecution arrayed 10 witnesses in support of its case but only 5 witnesses were produced and even the S.H.O., Police Station Chitalwana who submitted the charge-sheet was not examined by the prosecution.

4. Learned Counsel for the appellant, at the outset, attacked the judgment impugned raising the question that PW. 1 Guman Singh, A.S.I, of Police Station Chitalwana was not authorised to stop and make search of the camel which, according to him, was used in, transport of the seized opium. He invited attention of the Court towards Section 42 and 43 of the Act and vehemently argued that the learned trial Judge committed error of law while giving the finding that under Section 43 of the Act there is no provision for search by the authorised officer. According to the learned Counsel, under Section 42 and Section 43 only the authorised persons are entitled to make the search or seizure or to arrest the accused. He invited attention of the Court towards notification issued on 16.10.1986 which runs as under:

S.O. 115 dated 16th October 1986- 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.

It is contended by learned Counsel for the appellant that as per this notification the proviso lays down clearly 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. He also argued that the State Government

authorised posted as Station House Officers to exercise the powers mentioned in Section 42 of the Act with immediate effect and, therefore, according to the learned Counsel for the appellant, the A.S.I. Guman Singh was not competent to make the search or to arrest the appellant. He contended that the entire proceedings is vitiated and the appellant is entitled to be acquitted because the prosecution has violated the mandatory provisions of the Act.

5. Learned Counsel for the appellant vehemently argued that there is no evidence on record except the statement of Guman Singh, A.S.I, that he was holding the post of Station House Officer on the date of the occurrence. It is submitted that Guman Singh himself seized the opium from the back of the camel and arrested the appellant in connection therewith and thereby he became the complainant. It is submitted that under the mandate of the specific law he should not have started the investigation of the case and examine the witnesses under Section 161, Cr.P.C; but, according to his statement, he conducted whole of the investigation and, therefore, according to learned Counsel for the appellant, there has been no fair investigation in the case which has prejudiced the case against the appellant accused. It is also contended by learned Counsel for the appellant that the learned trial Court has committed error while holding the appellant guilty for the offence because even as per Section 49 of the Act, there is specific stipulation that any person authorised under Section 42, may, if he has reason to suspect that any animal or conveyance is, or is about to be, used for the transport of any narcotic drug or psychotropic substance or controlled substance, in respect of which he suspects that any provision of this Act has been, or is being, or is about to be, contravened at any time, stop such animal or conveyance.

6. It is further contended by learned Counsel for the appellant that admittedly the opium was recovered from the back of the camel and, according to statement of Guman Singh, A.S.I who, in his cross-examination, stated that he caused his men to rush for catching hold of the camel and he himself managed the cordon. He stated that he had five men with him and when he reached near the camel his men, camel and accused were standing close together. Thus, as per the statement of PW. 1 Guman Singh, A.S.I at the time of the search the accused was standing on the road and was not found sitting upon the saddle of the camel.

Learned Counsel for the appellant contended that both the motbir witnesses PW. 3 Bhura Ram and PW. 5 Ramzan turned hostile and have not supported the prosecution story. He vehemently contended that the prosecution purposely did not produce the 'roznamacha' which is the best evidence to corroboratively support the oral evidence given by the police officer and the prosecution witnesses PW. 3 Bhura Ram and PW. 5 Ramzan have falsified the version given by the police officials. According to learned Counsel for the appellant the prosecution has failed to prove that the recovered article was opium nor has it been established that the sample collected at the time of recovery was kept intact and it reached for examination without any possibility of tampering after it was seized. It is submitted that in this case the appellant has been falsely implicated by unauthorized persons and the prosecution has completely ignored the mandatory provisions of the Act and, therefore, the conviction of the appellant is not sustainable in the eye of law. It is also contended that in the statement recorded under Section 313, Cr. P.C. the appellant clarified the position that he has been falsely implicated in this case; but, the learned trial Judge has committed error while holding that under Section 43 there is no requirement of conducting the search by the authorised person. Similarly, the learned trial Judge has committed the error in holding that Section 49 of the Act is not applicable to the case. Likewise, Section 57 of the Act which too is mandatory in nature has been complied with according to statement of PW.1 Guman Singh, A.S.I, himself. Learned Counsel for the appellant, therefore, vehemently urged that the conclusion of the trial which is the impugned judgment deserves to be set aside and the appellant is entitled to be acquitted.

7. Learned Counsel for the appellant further argued that the prosecution has failed to prove the recovery memo which is said to be prepared at the time of the search. It is contended by learned Counsel for the appellant that, in all, out of 10 witnesses arrayed in the list of witnesses filed alongwith the challan before the Court, statements of 5 witnesses were recorded before the Court namely, PW. 1 Guman Singh, A.S.I., PW. 2 Narayan Singh, Constable, P.S. Chitalwana who gave evidence for depositing the samples at the office of the F.S.L., PW. 3 Bhura Ram, motbir witness to the recovery memo who turned hostile before the Court, PW. 4 Jalam Singh, Head Constable who is said to be one of the members of the police party and is malkhana in- charge, P.S. Chitalwana to whom the sealed packet of

opium was handed; and, PW.5 Mohammed Ramzan, motbir witness to the recovery memo who also turned hostile before the Court; meaning thereby, to corroborate the entire prosecution case only statements of PW. 1 Guman Singh, A.S.I, who was the complainant as well as investigating officer and PW. 4 Jalam Singh, one of the members of the police party and in-charge of the malkhana were recorded. He contended that as per the prosecution case and statements of PW.I Guman Singh and PW. 4 Jalam Singh, in all, six persons were in the police party at the time of the alleged recovery viz., constables Mangal Singh, Nathu Singh, Harlal, Lakharam, Head Constable Jalam Singh and A.S.I. Guman Singh; but, the prosecution did not produce Mangal Singh, Nathu Singh, Harlal and Lakharam before the Court; likewise; as per statement of PW. 1 Guman Singh, after completing the investigation and taking statements of the witnesses, he handed over the file to the Station House Officer, but the S.H.O. to whom the file is said to have been handed over and who filed the challan was not produced before the Court though he was arrayed as witness in the list of witnesses. It is also contended that as per major contradictions in the statements of PW.I Guman Singh and PW. 4 Jalam Singh with regard to preparing the recovery memo, it is clear that the prosecution has concocted the story and has failed to prove the case beyond reasonable doubt.

8. Per contra, the learned Public Prosecutor vehemently opposed the appeal and contended that the prosecution has proved its case beyond reasonable doubt. It is also stated by the learned Public Prosecutor that the learned trial Court has rightly arrived at the finding that according to Section 43 of the Act there is no necessity of search and seizure being made by the authorised person only and, likewise, Section 49, too, is not applicable to the present case.

9. The learned Public Prosecutor further contended that there was no necessity to produce any evidence showing that PW.I Guman Singh was posted as S.H.O. on that day. He contended that the quantity which is recovered is opium and it has been proved beyond reasonable doubt that the appellant was carrying the said contraband article and, therefore, he was rightly punished by the trial Court.

10. Having heard learned Counsel for the respective parties, I have carefully perused the entire record of the case and also gone through the judgments cited by learned Counsel for the appellant.

11. It is true that the Act is a special enactment purposely meant for checking the illegal drug trafficking, however, certain provisions in the Act are mandatory and transgression thereof in following the procedure for search and seizure or arrest completely vitiates the process of law and, therefore, there cannot be any circumvention and all the authorities empowered under the Act are required to act in accordance with the procedure laid down in the Act. Similarly, under the Act, vide Section 42 thereof, only the persons authorised by the Government can exercise the power conferred and, therefore, once by notification issued under Section 42 of the Act, if the Government has enumerated the authorities to exercise the power the prosecution cannot plead or put up the case that the person though not authorised, but in the absence of the authorised person, was acting as such and was at the relevant time exercising the power of the authorised person. Thus, the prosecution is required to prove its case within the four corners of the provisions of the Act. In this case, it is not disputed that the said contraband opium was recovered from the bag hanging at the saddle of the camel. It is also obvious from the record that neither the 'roznamacha' nor any authorisation order has been produced to show that Guman Singh, A.S.I, was acting authorisedly under Section 42 of the Act. From the language of Section 43 also it is clear that if any officer is exercising the powers to make seizure and arrest in public place, then for the same too, only those persons of any of the departments mentioned in Section 42 can make such seizure or arrest in the public place; meaning thereby, the legislature has specifically provided in Section 42 for the authorities to be empowered by the State Government by notification for exercising the powers under the Act. Admittedly the State Government issued notification whereby an A.S.I, is not authorised person. Likewise, it was incumbent upon the prosecution to prove that Guman Singh was, at the time of seizure and arrest, holding the charge of the post of Station House Officer; but, in this case, at the trial the prosecution did not take any pains to produce any document or order to prove that PW.I Guman Singh, A.S.I, was Station House Officer at the relevant time. Adding to this patent illegality in following the procedure, the motbir witnesses PW. 3 Bhura Ram

and PW. 5 Ramzan turned hostile and did not support the prosecution story. The prosecution enlisted 10 witnesses to prove its case but only 5 witnesses were produced before the Court out of whom two witnesses were motbir witnesses who turned hostile at the trial. Moreover, the person who presented the charge-sheet was not examined at the trial by the prosecution. On the record, the important question why the other witnesses were not examined by the prosecution goes unanswered. The Station House Officer himself was arrayed as witness of the prosecution but, as noted above, he was not examined though the Court had occasion at the trial to question the authority of the A.S.I. Guman Singh to make the search and arrest of the accused. Likewise, when Guman Singh gave statement that he was posted as S.H.O. it was necessary to produce documentary evidence or to adduce the oral evidence of the Station House Officer Heera Ram.

12. Learned Counsel for the appellant drew attention of the Court towards judgment of the Court rendered in the case of Malkit Singh @ Kala v. State of Rajasthan, reported in 2004(2) R.Cr.D. 102 (Raj.). At para 26 and 27 of the said judgment, this Court expressed the opinion that only the officer authorised by the State Government under Section 42 is competent to make the search. Relying upon an earlier decision of this Court in Bhanwarlal v. State of Rajasthan, 1999 Cr.L.R. (Raj.) 708, in Malkit Singh's case, this Court held that in the absence of cogent documentary evidence, merely on oral statement it cannot be said that the officer was competent to make the search and the search and seizure so made will be illegal. It is held that an order of conviction based thereon and sentence passed cannot be sustained in the eye of law. In State of Rajasthan v. Shankerlal, reported in 2002 (4) WLN 561 : RLW 2003(1) Raj. 320, this Court held that the prosecution case can be thrown out once it is evident that compliance of the mandatory provisions of the Act has not been made.

13. In my opinion, it is obvious from the appreciation of The evidence on record that Guman Singh, A.S.I, was not authorized for making The search and seizure. It is also not the case of the prosecution that Guman Singh, A.S.I, immediately informed his superior officer about the seizure of the contraband and arrest of the accused. Rather, it is revealed that he himself embarked upon the investigation. The trial Court further committed error in holding that the provisions, of Section 49

is not attracted in the case. It is nowhere slated by PW.I Guman Singh in his statement that he had handed over the entire material to the higher authorities within -18 hours. He only slated that after taking the statements the file was handed over to the S.H.O. In these circumstances, it is clear that the trial Court committed error In concluding that the investigation of the matter was made in accordance with The provisions of the Act.

14. With regard to contention of the appellant's counsel that the prosecution has failed to prove its case, I find great force in his argument that there are material contradictions in the testimony of both the police witnesses on the point of preparation of the recovery memo. In his statement, PW.I Guman Singh has categorically stated that the recovery memo was drawn by him upon which, from A to B, there is his signature. In his cross examination, PW. 4 Jalam Singh, one of the members of The police party and incharge of the malkhana, P.S. Chitalwana, stated that Ex. 3 is written in his hand wherein Guman Singh noted the case number. He stated that Ex.A is in the hand of Guman Singh. I have perused both Ex. P/3 and Ex. P/4. The hand- writing of both these documents is different. Ex. P/3, recover)' memo bears signatures of Jalam Singh also but both the witnesses did not say that upon Ex. P/3 Jalam Singh, PW. 4 also put his signature. Ex. P/4 bears signature of Guman Singh. A.S.I, only. In these circumstances it is obvious that the prosecution case is doubtful as to who has prepared the recovery memo. Each of the police witnesses Guman Singh, PW.I and Jalam Singh, PW. 4 states on oath that he prepared the document Ex. P.3. The statements of both the police witnesses given on oath create confusion and doubt and it is not safe without cogent evidence coming on record to base conviction. The material document, recovery memo is claimed to have been prepared by both I'W. 1 Guman Singh and PW. 1 Jalam Singh. Further, Guman Singh, PW. I categorically stated that he has not given any information to the higher authorities. Likewise, it is not proved on record whether after completion of the investigation the file was handed over to The S.H.O. Heera Ram or not.

15. There is yet another fact which is important in this case. Guman Singh, PW.I who was not authorised to conduct the search and seizure In accordance with the Act himself is complainant in this case and he himself investigated the matter and,

as per his statement, after preparing the documents and depositing the recovered contra-band to the malkhana incharge Jalam Singh, PW. 4 and after taking statements of witnesses, he handed over the file to the Station House Officer. But, when he handed over the file is not proved on the record by the prosecution. Thus, the prosecution has completely failed to adduced coherent and cogent evidence to prove its case and the trial Court also failed to consider these important aspects of the matter before arriving at the finding of guilt against the appellant. Hence the finding of guilt arrived at by the trial Court is perverse and against settled proposition of law. Consequently. The conviction of the appellant and sentence awarded by the trial Court cannot be sustained.

16. As a result, this appeal is allowed. The judgment impugned dated 26.11.1987 passed by learned Sessions Judge, Jalore in Sessions Case No. 28/87 convicting the appellant under Section 8/18 of the Act is set aside. The appellant is acquitted from the charge. He is on bail. His bail bonds stand discharged.

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