

Babu Ram Vs. State

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Court : Rajasthan

Decided On : Aug-12-2009

Reported in : RLW2010(1)Raj169

Judge : C.M. Totla, J.

Appellant : Babu Ram

Respondent : State

Judgement :

C.M. Totla, J.

1. Appellant challenges his conviction and sentence awarded of ten years R.I. and fine of Rs. 1 lac for offence of Section 18 NDPS Act per judgment dated 31.08.87 in Sessions Case No. 10/1986.

2. Alleged facts leading to appellant's prosecution are that on 24.01.1986, S.H.O. PW/8 making the entry No. 524 Ex. P/9 6 a.m. in Roznamcha that as per information of informer, certain person is to come in Godawas ki Dhani, so he along with named police person also proceeds in jeep (to act). As the team led by S.H.O. arrived at Godawas at about 8.00 a.m., a young man having a 'thaili' (bag) ran from out of Heera ki dhani towards west who was got hold of and he disclosed his name to be Babu Ram S/o Jora Ram and when the bag carried by him in hand checked, in it was opium like substance which when weighed procuring weight

from dhani of Hapa Ram found 3 kg. Seizing substance and separating sample of 30 gm and keeping remaining substance in same polythene sealed separately. Memo of seizure prepared Ex. P/2 also bears impression of seal used. Accused arrested vide memo Ex. P/4 and site plan Ex. P/1 prepared. Arriving back at P.S. making entry of events in roznamcha at 10.00 p.m. No. 540 Ex. P/10, F.I.R No. 4/86 Ex. P/11 registered for the offence of Section 18 N.D.P.S. Act. Intactly keeping articles in malkhana, packet of sample was delivered at FSL with forwarding letter Ex. P/1. After usual investigation, charge-sheet submitted and on committal, case registered.

3. Appellant charged for the offence that he at about 8.00 a.m. of 24.01.1986 within the limits of village Godawas possessed without license or authorization 3 kg of opium which was recovered from his possession claimed trial.

4. The prosecution examined eight witnesses among them PW- 8 Abdul Majid is S.H.O. who doing and searching as above, seized the opium, Constable PW- 3 Khet Singh, PW- 4 Head Constable Goma Ram and Constable Gumna Ram PW- 6 were among 7-8 police personnel who were with S.H.O. -PW- 7 Jetha Ram and PW- 5 Bhagwana Ram are independent witnesses who are declared hostile. Head Constable Goma Ram malkhana Incharge and PW- 1 and PW- 2 are witnesses regarding safe and intact custody of packets and handling over of sample intactly at F.S.L. As per F.S.L. report Ex. P/12, the sample was of opium having 1.61% morphine.

5. Appellant when examined Under Section 313 Cr. P.C. explained that no such or any substance recovered from him and he because of drought came for cow grazing from Barmer to this village Godawas where Police personnels came, called him and he taken to Police Station where he arrested. In defence examined Haka Ram DW- 1 who is said to be the person who when called by Police men arrived there to weigh the substance. As per him, the packet having this substance was brought by Police men from the house of Heera Ram.

6. Learned Sessions Judge inferring proved possession and recovery from appellant convicted and sentenced the appellant as above.

7. This appeal was earlier disposed of vide judgment dated 20.2.2002 and Hon'ble the Apex Court setting aside the acquittal per judgment dated 5.6.2007 in Criminal Appeal No. 1097/2002 observed and directed as under:

However, we find that other points were urged in support of the appeal before the High Court but the High Court allowed the appeal filed by the accused on the ground of non-compliance of Section 50 of the Act. It did not examine the other grounds of challenge. We therefore, remit the matter to the High Court to hear the appeal afresh on grounds other than that of alleged non-compliance with Section 50 of the Act, which, as noted above, has no application to the facts of the case.

8. Heard learned Counsel for the appellant and learned Public Prosecutor.

9. Learned Counsel for the appellant argued that (1) search and seizure is made by S.H.O. PW- 9 who was not authorized for doing so Under Section 42(1) - S.Is. posted as S.H.Os. are authorised only w.e.f. 16.10.1986 and this search and seizure is of 24.01.1986(2) per prosecution of S.H.O. PW- 8 was, as also is mentioned in Roznamcha entry Ex. P/9, acting on a certain information received - such information whatever was not reduced in writing which is mandatory a must per Section 42(1)(3) No evidence that information received was entered anywhere - neither any evidence that copies sent to higher officers complying Section 42(ii)(4) not proved is that the bag was with or in possession of appellant (5) independent witnesses motbirs do not support any such recovery and Hapa Ram DW- 1 who admittedly was there refutes version of prosecution - no Dhani of appellant and neither is of close family of his is there and dhani was of other named person.

10. Relying on decisions (i) Cri. L.R. (SC) 1994 Page 241 State of Punjab v. Balbir Singh (ii) 2001 Cr. L.R. (SC) 54 Roy V.D. v. State of Kerala (iii) 1989 (1) Crimes 276 Shanti Lal v. State of Rajasthan (iv) 1987 (3) Crimes 629 Nand Lal v. State of Rajasthan (v) 2009 (1) R. Cr.D. 66 (Raj.) 92 State of Rajasthan v. Vikram Singh (vi) judgment dated 10.2.2004 in Criminal Appeal No. 1222/2003 Devi Lal v. State of Rajasthan, argued that on the basis of search and seizure made by S.H.O. prior to 16.10.86, no conviction can be and that provisions of Section 42 of the N.D.P.S. Act are mandatorily to be followed and that non-compliance of Section 42(1)

vitiates trial.

11. Learned Public Prosecutor submitted that S.H.O. by virtue of his posting was authorised to search and seize and for authorisations, provision specifically in Section 74.

12. Considered arguments, perused the judgment and record.

13. Examining factual aspect, S.H.O. the seizure Officer PW- 8 state that on 23.11.86 Head Constable Gumana Ram brought to him Government jeep provided to Circle Officer. With this is statement of Gumana Ram PW- 6 that he posted as Head Constable with C.O. on directions of C.O. (Dy. S.P.) taking jeep reached P.S. Mandli in night at 11.00 p.m. on 23.1.86 and then in morning accompanied S.H.O. and others - S.H.O. PW- 8 says that he had some information regarding opium so he called the jeep - meaning thereby PW- 8 on January 23 prior to 8-9 p.m had some information, so he called Jeep from Balotra Dy. S.P. which provided at P.S. by 10 p.m. The jeep was called on some information regarding opium - and as in morning party proceeded in the jeep obvious inference is that information if any was in relation to this search and seizure. Section 41 to 60 provide for authorisation, empowerment, procedure of search and seizure and then procedure to be followed in relation to contraband articles.

Section 42 read and provide like this:

42. Power of entry, search, seizure and arrest without warrant or authorisation.--
(1) Any such officer (being an officer superior in rank to a peon, sepoy or constable) of the departments of...is empowered in this behalf by general or special order by the Central Government or any such officer...police or any other department of a State Government as is empowered in this behalf by general or special order of the State Government, if he has reason to believe from persons knowledge or information given by any person and taken down in writing that any narcotic drug or.....

14. For the information taken in writing, Section 42(2) mandates its forwarding to superior officer.

15. Section 43 empowers for seizure and arrest in public place like this:

43. Power of seizure and arrest in public place.--Any officer of any of the departments mentioned in Section 42 may --

16. The effect of non-compliance is well established and reiterated in various pronouncements of Hon'ble Apex Court. In State of Punjab v. Balbir Singh : (1994) 3 SCC 299, observed that:

(2-C) Under Section 42(1) the empowered officer if has a prior information given by any person, that should necessarily be taken down in writing. But if he has reason to believe from personal knowledge that offences under Chapter IV have been committed or material which may furnish evidence of commission of such offences are concealed in any building, etc. he may carry out the arrest or search without a warrant between sunrise and sunset and this provision does not mandate that he should record his reasons of belief. But under the proviso to Section 42(1) if such officer has to carry out such search between sunset and sunrise, he must record the grounds of his belief.

(4-A) If a police officer, even if he happens to be an 'empowered' officer while effecting an arrest or search during normal investigation into offences purely, under the provisions of Cr. P.C. fails to strictly comply with the provisions of Section 100 and 165 Cr. P.C. including the requirement to record reasons, such failure would only amount to an Irregularity.

(4-B) If an empowered officer or an authorised officer Under Section 41(2) of the Act carries out a search, he would be doing so under the provisions of Cr. P.C., namely, Sections 100 and 165 Cr. P.C. and if there is no strictly compliance with the provisions of Cr. P.C. then such search would not be per se be illegal and would not vitiate the trial. The effect of such failure has to be borne in mind by the Courts while appreciating the evidence in the facts an circumstances of each case.

(5)

(6) The provisions of Sections 52 and 57 which deal with the steps to be taken by the officers after making arrest or seizure Under Sections 41 to 44 are by

themselves not mandatory. If there is non-compliance or if there are lapses like delay, etc. then the same has to be examined to see whether any prejudice has been caused to the accused and such failure will have a bearing on the appreciation of evidence regarding arrest or seizure as well as on merits of the case.

17. When any officer contemplates or initiates any action, he almost mandatorily has to begin and do as is provided in Section 42 of the Act. The effect of non-compliance being prejudicial to the accused may vitiate trial. When a officer of a department mentioned in Section 42 receives any information in course of any other investigation or patrolling etc. where or incidentally, then not necessarily procedure Land down in Section 42(1) is to be followed, but very straight are the provisions of section, that is search and seizure is initiated and contemplated in consequence of certain information received. In the instant case, S.H.O. received information about 8.00 p.m. last evening about 11-12 hours prior to initiating action and the information was in relation to a certain residential premises and because of this information received, the S.H.O. with other personnel departed for seizure etc. then provisions of Section 42(1) are necessarily to be followed.

18. Thus, position appears that any officer of any of the department mentioned in Section 42 may do seizure and arrest in public place without mandatorily complying with Section 42(1) & (2). These provisions read together say that if any action is initiated on some information, the same should be reduced in writing complying with Section 42(1). Again Section 43 speaks of any officers mentioned in Section 41, 42 and Section 42 mentions for authorized. Any initiation of proceedings or action on receipt of information i.e. is to be at least as far as possible to be per provisions of Section 42(1). Any information received while patrolling on investigating elsewhere some other case or by chance leading to chance recovery etc.

19. This search and seizure leading to prosecution is made by S.H.O. on 24.1.86 S.H.Os. are authorised for search and seizure Under Section 42 per notification of 16.10.86. As such prior to 16.10.86 S.H.Os. were not empowered officers Under Section 42.

20. Section 74 of the Act provide that every officer or employee of the Government exercising powers with respect to matters provided in the Act shall be deemed to have been empowered to exercise and perform all such (under this Act). As per Section 74, the officers who were authorised as per provisions of law applicable just prior to the Act are deemed to have been authorised and appointed under the promulgated Act. Appellant is charged for possession of substance opium then the Act applicable immediate preceding was Opium Act. Section 14 and 15 of the Opium Act, 1878 provide for such powers of search seizure etc. According to Section 14 of Opium Act any officer of mentioned department and authorised in this behalf by Central or State Government was empowered to search, seizure, arrest etc. Section 14 also provides for taking down the information in writing. Section 15 authorizes for seizure in open place or in transit to the officers of the said department. Per provisions of Section 16, all searches are to be made in accordance with provisions of Code of Criminal Procedure. Thus, even prior to coming into force of N.D.P.S. Act, 1985, officer had to be authorized one and also required is to reduce information in writing.

21. S.H.O. PW- 8 state that making entry in Roznarncha Ex. P/9A and acting in pursuance of information received be proceeded (for search) in morning. In cross-examination PW- 8 says that jeep was brought to him by Head constable previous night at 10 p.m. and he PW- 8 did not provide any information but he the S.H.O. himself had information. Roznarncha entry Ex. P/9 mentions of information received from informer that certain person is to bring opium in dhani of Heera Ram Bishnoi within village of Godawas. In course of arguments, prosecution and defence both stated that by dhani is meant a residential premises like kachha rooms or hut. As such, the information was that the opium is in Dhani of Heera Ram Bishnoi. Mention of information is in Roznarncha but the same was not reduced in writing in any other form. Such mentioning of information in Roznarncha can very hardly be equated with reducing in writing the information. Further, as is evident the information was received by 8-9 p.m. preceding day and the vehicle was called from Dy. S.P. and reached and there is nothing to disclose that Dy. S.P. was informed, if he was informed at all. However, not much significance need be attached to non-complying or complying to provision of Section 42(2), the fact remains that S.H.O. initiated action only after receipt of

information. The information was for substance in dhani meaning thereby for substance in residential like premises.

22. S.H.O. was not authorised Under Section 42 on the day of alleged seizure. In abovementioned and some other authorities clearly is held the necessity of officer being empowered one and the effect of search and seizure by non-empowerment. The officer was not empowered on the relevant day.

23. S.H.O. PW- 8 says that on information, they moved towards Heera Bishnoi's Dhani and at about 8 a.m. as they reached at Heera Bishnoi's Dhani on hearing noise of jeep, one person coming out of Dhani with Theli ran away who was caught by them and searched and recovery of this opium which was in 'thaili' followed. PW- 8 states that at that place was dhanis of Heera, Happa and others and at the time of appellant was got hold of persons were present in dhani. PW- 8 also say that Dhani of Bhuwana and Jeta Ram are nearby but cannot say of exact distance and that Happa Ram was also present there. In site plan Ex. D/1 also are shown Dhani of Happa Ram and Jora Ram but no such Dhani of Bhagwana Ram PW- 5. If dhani of any motbir is there, so is not mentioned in site plan.

24. Abdul Majid PW- 8 states that information regarding opium being in Heera Ram's Dhani was received by him at about 8-9 p.m. last evening and in the same breath says that no such information of opium in Dhani was roznamcha entry Ex. P/9 clearly mention of such information.

25. Khet Singh PW- 3 Constable was with S.H.O. and his signature appear on Ex. P/3 depose that as they reached Godawas about 8 a.m., a 'Chhora' (person of young age like juvenile or little above) ran from Dhani of Heera Ram who was apprehended then and there and in polythene bag of his possession was opium - in cross-examination says that as their vehicle reached there, appellant (who is 'Bhanej' meaning thereby son of sister of Heera Ram) ran away from Dhani of Heera Ram. Persons came out of dhani of Heera Ram who also come to them (police personnel) on calling. Bhagwana Ram and Jeta Ram were in Dhani of Heera Ram. According to this witness, PW- 3 as their jeep reached, all these persons came out of Dhani of Heera Ram and in Dhani of Heera Ram were 4-5 persons including Heera's son. If this be so, it means that person who allegedly

ran away was amongst these persons who all were sitting in Dhani. As above information was of material being in Dhani.

26. Head Constable Goma Ram PW- 4 says that when they reached at Dhani, a person coming out of Dhani ran away who was apprehended and surrounded by them and then searched - in cross-examination say that there are 3-4 Dhani which are close adjacent and that dhani of Heera Ram was also searched. According to evidence of above witnesses, as soon as these person reached very near or at the gate of Dhani, one person the appellant ran away and 4-5 persons were also there.

27. As above in January 1986, S.H.O. was not empowered officer to conduct search.

28. Counsel for appellant argues that S.H.O. PW- 8 admits that copy of seizure memo given to accused Ex. D/2 is carbon copy, same as that of Ex. P/3. argued that as it is the carbon copy prepared simultaneously but on Ex. P/3 time clearly written is of 8.00 a.m. whereas, no so in carbon copy Ex. D/2 and apparently not clear is so and figures 8 do not seem to be exactly same. In the opinion of Court, no need to examine every aspect minutely.

29. In the totality of above circumstances taken cumulatively and when officer conducting search seizure etc. was not authorised one and S.H.Os. was authorised only w.e.f. 16.10.86 and that information though received about 12 hours earlier of initiating action not reduced in writing, so, the search and seizure is not as per and following the procedure provided for, so, the substance cannot be inferred to be recovered from possession of the appellant.

30. For the reasons above and the recovery from the appellant being doubtful, the appellant deserves to be acquitted.

31. Accordingly, this appeal filed by appellant Babu Ram is allowed and the impugned judgment and order dated 31.8.1987 passed by learned Sessions Judge, Balotra in Sessions Case No. 10/1986 is set aside and accused appellant is acquitted of the charge of the offence Under Section 18 of N.D.P.S. Act.

Appellant is on bail. He need not surrender to his bail bonds.

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