

Narayan Vs. State of Rajasthan

Narayan Vs. State of Rajasthan

SooperKanoon Citation : sooperkanoon.com/771654

Court : Rajasthan

Decided On : Jan-05-2001

Reported in : 2001CriLJ1370

Judge : Sunil Kumar Garg, J.

Acts : [Narcotic Drugs and Psychotropic Substances Act, 1985](#) - Sections 8, 18, 42(1)-(2), and 50; Evidence Act - Sections 137 and 138; Code of Criminal Procedure (CrPC) - Sections 313

Appeal No. : Civil Appeal No. 368 of 2000.

Appellant : Narayan

Respondent : State of Rajasthan

Advocate for Def. : R.K. Soni, Public Prosecutor

Advocate for Pet/Ap. : R.S. Rathore, Adv.

Disposition : Appeal allowed

Judgement :

Sunil Kumar Garg, J.

1. This is an appeal by the accused appellant against the judgment dated 10-7-2000 and order of sentence dated 13-7-2000 passed by the learned Special

Judge, NDPS Cases, Jodhpur in Sessions Case No. 38/98 by which he convicted the accused appellant for the offence under Section 8/18 of the [Narcotic Drugs and Psychotropic Substances Act, 1985](#) (hereinafter referred to as the NDPS Act') and sentenced him to undergo ten years' Rigorous Imprisonment and to pay a fine of Rs. one lac, in default of payment of fine, to further undergo RI for two and half years.

2. The facts giving rise to this appeal, in short, are as follows :-

On 7-6-1998 at about 6-15 p.m., P.W. 8 Mohanlal, SHO, Police Station Kotwali, Pali City registered the FIR No. 196/98 (Ex. P/ 12) stating inter-alia that on 7-6-1998 at about 2-05 p.m. he received a secret information from Mukhbir to the effect that in Ashapura Tea Stall, which is situated on the main mandiya road, Pali, a boy aged about 20-22 years of fair colour deals in the business of purchasing and selling of illegal contraband opium. He reduced the said information into writing in Ex. P/9 to make the compliance of Section 42(1) of the NDPS Act and, thereafter, he along with other police officials, namely, PW 2 Man Singh, SI, PW. 1 Nijukhan, ASI and Om Karan, FC proceeded towards the spot in a Government Jeep and reached there at 2-25 p.m., where they saw one person running, but he was apprehended and on being asked, he told his name as Narayan (present accused-appellant). Thereafter, PW. 8 Mohanlal through notice Ex. P/1 called two motbirs, namely, PW. 3 Talib and P.W. 4 Abdul Hameed. It is further stated in that report that a notice (Ex. P/2) under Section 50 of the NDPS Act was also given by PW. 8 Mohanlal to the accused appellant and upon this, he gave consent that his search could be made by PW. 8 Mohanlal and the fard of consent is Ex. P/3. Thereafter, the accused appellant was searched and on search, a bag, which was put by the accused appellant on his right shoulder, was recovered and on opening the said bag, plastic packets containing black substance were found and on being tasted, it was found to be contraband opium. Thereafter, it was weighed and its weight was found to be 1 kg. 250 grms., out of which, two samples of 30 grms, each were taken and they were sealed on the spot and marked as S-1 and S-2 and the remaining opium i.e. 1kg. 190 grms. was also sealed on the spot and marked as 'A'. The fard of search and seizure was prepared by PW. 8 Mohanlal and the same is Ex. P/4. Since the accused appellant did not possess any valid

license for keeping the opium, therefore, he has committed offence under Section 8/18 of the NDPS Act. The accused appellant was arrested through Ex. P/10. Thereafter, the articles recovered from the accused appellant were handed over by PW. 8 Mohanlal to PW. 5 Punam Singh, who deposited the same in the Malkhana and made entries in the Malkhana Register and the copy of Malkhana Register is Ex. P/6. Thereafter, vide letter dated 8-6-1998 (Ex. P/14), one sample S-1 was sent to SP Office, Pali for sending it to FSL, Jaipur for chemical analysis and from SP Office, Pali, the sample S-1 was sent to FSL, Jaipur along with forwarding letter Ex. P/15 through PW. 10 Dilip Singh. The receipt of depositing the sample in FSL, Jaipur is Ex. P/8 and the report of FSL is Ex. P/17. From the FSL report Ex. P/ 17, it appears that sample S-1 gave positive tests for the presence of chief constituents of coagulated juice of opium poppy having 5.89% (five point eighty-nine percent) morphine.

After usual investigation, the police submitted challan against the accused appellant for the offence under Section 8/18 of the NDPS Act.

On 27-10-1998, the learned Special Judge, NDPS Cases, Jodhpur framed charge against the accused appellant for the offence under Section 8/18 of the NDPS Act. The charge was read over and explained to the accused appellant. The appellant denied the charge and claimed trial.

During the course of trial, the prosecution examined as many as ten witnesses and got exhibited several documents. Thereafter, statement of the accused appellant under Section 313, Cr. P.C. was recorded. No evidence in defence was led by the accused appellant.

After conclusion of the trial, the learned Special Judge, NDPS Cases, Jodhpur through his judgment dated 10-7-2000 and order of sentence dated 13-7-2000 convicted and sentenced the accused appellant in the manner as stated above holding inter-alia that the prosecution has proved, its case beyond reasonable doubt against the accused appellant for the offence under Section 8/18 of the NDPS Act.

Aggrieved from the said judgment dated 10-7-2000 and order of sentence dated 13-7-2000, passed by the learned Special Judge, NDPS Cases, Jodhpur, the present appeal has been filed by the accused appellant.

3. In this appeal, the learned counsel for the accused appellant has made the following submissions :-

1. That PW. 8 Mohanlal, Seizure Officer has stated in his statement that recovery was made from the bag, which was found with the accused appellant on his personal search, but this version of PW. 8 Mohanlal is not supported by the independent motbir witnesses, namely, PW. 3 Talib and PW. 4 Abdul Hameed as these two motbir witnesses have admitted in their cross-examination that opium which was recovered, was found in an iron box. Thus, there is material contradictions about the alleged recovery and the prosecution case should be rejected on this count alone.

2. That reliance be placed on the statements of motbir witnesses, namely, PW. 3 Talib and PW. 4 Abdul Hameed, as they have not been declared hostile and there is no reason to disbelieve their testimony and the learned Special Judge has committed serious illegality in not accepting the statements of these two motbir witnesses.

3. That no compliance of Section 42(2) of the NDPS Act has been made in this case, as there is no evidence to show that secret information, which was received by PW. 8 Mohanlal from Mukhbir, has been sent to the superior officer and this requirement is mandatory and non-compliance of this mandatory requirement vitiates the entire trial.

4. That compliance of mandatory provisions of Section 50 of the NDPS Act has also not been made in the present case therefore, the whole trial stands vitiated and the accused appellant is entitled to acquittal on this ground alone.

5. That PW. 9 Shokat Hussain, who was posted in SP Office, Pali has stated in his statement that on 8-6- 1998, he received the sample from Dilip Singh, PW. 10 and only one seal was affixed on it and no other seal was affixed, whereas PW. 8

Mohanlal states that articles were sealed by two seals and furthermore, it has come in evidence that on the spot, no fard of specimen seal was prepared. Thus, the prosecution has failed to establish that samples were kept properly sealed and intact and were sent to FSL in same sealed condition as were sealed at the time of seizure.

4. On the other hand, the learned Public Prosecutor supported the impugned judgment and order passed by the learned Special Judge, NDPS Cases, Jodhpur.

5. I have heard the learned counsel for the accused appellant and the learned public prosecutor and perused the record of the case.

6. Since the above questions raised by the learned counsel for the accused appellant cannot be answered without discussing the evidence produced by the prosecution, therefore, evidence of the present case has to be looked into.

7. The main witness in the present case is PW/8, Mohanlal, who conducted the search and seizure and received the secret information from Mukhbir. In his examination-in-chief, he has supported the version given by him in FIR Ex. P/12 and has further stated that samples of 30 grms. each were kept in iron box and sealed on the spot. He has admitted the following facts in his cross-examination :-

1. That it is correct to say that secret information which was reduced into writing in Ex. P/9 does not mention the fact that information to superior officer was given.

2. That notice (Ex. P/3) was given by him to accused appellant at about 4-25 p.m. and no time was mentioned in it.

3. That he did not prepare the fard of specimen seal separately on the spot and all the proceedings were dictated by him on the spot and were got reduced into writing by Om Karan, Constable.

4. That on the packets, first he put the seal of Thana and, thereafter, his personal seal.

8. From the fard of search and seizure Ex. P/4 prepared by PW. 8 Mohanlal, it appears :-

1. That the proceedings of search and seizure were started at 2.48 p.m. and concluded at 3-15 p.m.

2. That two motbir witnesses of the fard Ex. P/4 were PW. 3 Talib and PW. 4 Abdul Hameed.

3. That there is no mention of the fact that PW. 1 Nijukhan and PW. 2 Man Singh were also with PW. 8 Mohanlal at the time of search and seizure.

9. PW. 3 Talib is the motbir witness of fard of search and seizure (Ex. P/4). He states that in his presence police recovered contraband opium from the hotel and two samples of 30 grms. each were also taken and, thereafter, they were sealed in the plastic packets. In his cross-examination, this witness has admitted :-

1. That opium was recovered from the iron box.

2. That two vehicles of police came and out of which, one vehicle was of Dy. Sahib.

3. That in one side of the shop, an iron box was lying and from it, opium was recovered.

10. Similar is the statement of PW. 4 Abdul Hameed, another motbir witness of search and seizure (Ex. P/4).

11. Before proceeding further it may be mentioned here :-

1. That these two motbir witnesses, namely, PW. 3 Talib and PW. 4 Abdul Hameed have not been further cross-examined by the prosecution nor they have been declared hostile.

2. That these two motbir witnesses do not state the fact that before search of the accused appellant, the accused appellant was given option whether he wanted to be searched before the Magistrate or Gazetted Officer and they are silent on this point.

12. P.W. 1 Nijukhan is another witness, who was ASI on 7-6-1998 and accompanied PW. 8 Mohanlal as Member of Raid Party and he states that two motbir witnesses, namely, PW. 3 Talib and PW. 4 Abdul Hameed were called and, thereafter, accused appellant was asked about his consent for search and the accused appellant gave his consent and thereafter, he was searched. He has further admitted that fard of search and seizure Ex. P/4 does not bear his signatures. It may be mentioned here that this police witness also does not say that any question in the form whether he wanted to be searched before the Magistrate or Gazetted Officer was put to the accused appellant.

13. PW. 2 Man Singh is another police witness, who was SI on the relevant date and he states that a question in the form whether he wanted to be searched before the Magistrate or Gazetted Officer was put by PW. 8 Mohanlal to accused appellant, upon which, accused appellant gave his consent and, thereafter, accused appellant was searched and opium was recovered. This witness also admits that the fard of search and seizure Ex. P/4 does not bear his signatures.

14. In FIR Ex. P/12, there is also no mention of the fact that before search of the accused appellant, he was asked in the form whether he wanted to be searched before the Magistrate or Gazetted Officer and the only words found in the FIR Ex. P/12 are that only consent of search was taken from the accused appellant. In the fard of search and seizure Ex. P/4, there is also no mention of the fact that a question was put to the accused appellant whether he wanted to be searched before the Magistrate or Gazetted Officer.

15. Thus, from the above evidence, it is very much clear :-

1. That in the notice (Ex. P/2) under Section 50 of the NDPS Act and fard of consent Ex. P/3, no time is mentioned.

2. That in the fard of search and seizure (Ex. P/4), there is no mention that before search, the accused appellant was asked whether he wanted to be searched before the Magistrate or Gazetted Officer.

3. That in the FIR Ex. P/12, it has been mentioned that consent of search was taken by PW. 8 Mohanlal from accused appellant. However, it has not been mentioned in it that accused appellant was asked whether he wanted to be searched before the Magistrate or Gazetted Officer.

4. That the motbir witnesses of the fard of consent (Ex. P/3) namely, PW. 3 Talib and PW. 4 Abdul Hameed do not state that before search, the accused appellant was given any option whether he wanted to be searched before the Magistrate or Gazetted Officer and they are silent on this point.

5. That PW. 1 Nijukhan, who accompanied PW. 8 Mohanlal as Member of the Raid Party has only stated that accused appellant was asked about his consent for search. However, he does not say that any question in the form whether he wanted to be searched before the Magistrate or Gazetted Officer was put to him.

6. That P.W. 1 Nijukhan as well as PW. 2 Man Singh, both police officials, who accompanied PW. 8 Mohanlal, have admitted that fard of search and seizure Ex. P/4 does not bear their signatures.

7. That both the motbir witnesses, namely, PW. 3 Talib and PW. 4 Abdul Hameed have not supported the prosecution case and they have not been further cross-examined nor they have been declared hostile and their version is different from the version given by PW. 8 Mohanlal and PW. 1 Nijukhan and PW. 2 Man Singh, other police official witnesses.

8. That PW. 8 Mohanlal, who conducted the search stands contradicted by PW. 3 Talib and PW. 4 Abdul Hameed (both motbir witnesses) in all material particulars.

16. The question that arises for consideration is whether in the above circumstances, compliance of Section 50 of the NDPS Act can be said to have been made by the prosecution or not.

17. Looking to the above facts and circumstances, it cannot be said that before search of the accused appellant, he was asked in the form whether he wanted to be searched before the Magistrate or Gazetted Officer. The fard of consent of accused appellant is Ex. P/3 and motbir witnesses of this fard Ex. P/3 are PW. 3

Talib and PW. 4 Abdul Hameed and as already stated above, both the motbir witnesses do not mention that any question in the form whether he wanted to be searched before the Magistrate or Gazetted Officer was put by PW. 8 Mohanlal to accused appellant. Apart from this, it has not been mentioned in the FIR Ex. P/12 as well as in the fard of search and seizure Ex. P/4 that before search of the accused appellant, a question was put to him whether he wanted to be searched before the Magistrate or Gazetted Officer.

18. Thus, it is held that in the present case, compliance of the mandatory provisions of Section 50 of the NDPS Act has not been made in its letter and spirit by PW. 8 Mohanlal.

19. The next question is what would be effect of non-compliance of mandatory provisions of Section 50 of the NDPS Act.

20. The Hon'ble Supreme Court in so many cases has held that the provisions of Section 50 of the NDPS Act are mandatory in nature and violation of these provisions would per se be fatal to the prosecution case or in other words, non-compliance of these provisions would have the effect of vitiating the entire trial.

21. Since in the present case, mandatory provisions of Section 50 of the NDPS Act have not been complied with in its letter and spirit by the prosecution, therefore, the whole proceedings stand vitiated and on this ground alone, the accused appellant is entitled to acquittal.

22. The argument of the learned counsel for the accused appellant with regard to Section 50 of the NDPS Act stands decided accordingly.

23. So far as the recovery of opium from the accused appellant is concerned, as stated earlier, the version of the motbir witnesses of the fard of search and seizure (Ex. P/4), namely, PW. 3 Talib and PW. 4 Abdul Hameed is totally different from the version given by PW. 8 Mohanlal, who conducted the search and seizure and other police official witnesses i.e. PW. 1 Nijukhan and PW. 2 Man Singh.

24. As already stated above, these two motbir witnesses have neither been further cross-examined nor declared hostile. The question for consideration is whether in

the above circumstances, reliance can be placed on the statements of these two motbir witnesses i.e. P.W. 3 Talib and PW. 4 Abdul Hameed or not.

25. These two motbir witnesses have stated in examination-in-chief that contraband article was recovered by the police from the hotel, but in their cross-examination, they have specifically stated that contraband opium was lying in iron box and opium was recovered from it. Thus, in this case, the importance of this cross-examination has significant role to weaken and destory the case of the prosecution.

26. Before proceeding further, something should be said about the importance of cross-examination in a criminal trial. Importance of cross-examination in a criminal trial.

27. The object of cross-examination is two fold to weaken, qualify or destroy the case of the opponent and to establish the party's own case by means of his opponent's witnesses. The objects are to impeach the accuracy, credibility, and the general value of the evidence given in chief, to sift the facts already stated by the witness, to detect and expose discrepancies, or to elicit suppressed facts which will support the case of the cross-examining party. The exercise of this right is one of the most efficacious tests for the discovery of truth. By it, the situation of the witness With respect to the parties and to the subject of litigation, his interest, his motives, his inclination and prejudices, his character, his means of obtaining a correct and certain knowledge of facts, his powers of discernment, memory and description are all fully investigated and ascertained. The object of cross-examination is not to produce startling effects but to elicit facts which will support the theory intended to be put forward. Sections 137 and 138 of the Evidence Act clearly show that cross-examination is as essential as examination-in-chief, for eliciting from a witness material which is to constitute evidence.

28. Whether the evidence of these two motbir witnesses should be accepted or not, but the evidence, which has come on record from their statements, is in direct conflict with the statements of PW. 8 Mohanlal, SHO, who conducted the search and prepared seizure memo Ex. P/4. Thus, it can be said that statement of PW. 8 Mohanlal is very much different from what PW. 3 Talib and PW. 4 Abdul Hameed,

motbir witnesses disclosed and this is totally contrary to the case of the prosecution and evidence of the police official witnesses. When the public witnesses shake the case of the prosecution, it becomes difficult to pin faith in the testimonies of the official witnesses.

29. Looking to the evidence led in the case and glaring discrepancies found in the statements of the PW. 8 Mohanlal, SHO, who conducted the search and prepared seizure memo Ex. P/4 and motbir witnesses, namely, PW. 3 Talib and PW. 4 Abdul Hameed, it cannot be said that the prosecution has proved its case against the accused appellant beyond all reasonable doubts. In all material particulars, PW, 8 Mohanlal stands contradicted by PW. 3 Talib and PW, 4 Abdul Hameed (motbir witnesses).

30. Thus, recovery of contraband article in the present case has become doubtful on the point whether it was recovered from the person of the accused appellant or from iron box lying in the hotel and from this point of view also, the findings of the learned Special Judge in this respect cannot be accepted and liable to be set aside.

31. Hence, the arguments of the learned counsel for the accused appellant with regard to recovery and placing reliance on motbir witnesses stand decided accordingly:

32. So far as the argument that it is a case of non-compliance of Section 42(2) of the NDPS Act is concerned, it cannot be accepted as PW8 Mohanlal has proved the Rojnamcha Ex. P/8A which was reduced into writing on 7-6-1998 at, 2.15 PM, where it has been specifically mentioned that Secret information received from the Mukhbir was sent to SP office through PW7 Bhawani Singh and PW7 Bhawani Singh has supported this version. Therefore, if the fact that information was sent to SP office is not mentioned in Ex. P/9, it would not affect the prosecution case.

33. Thus, it is held that in the present case, compliance of the provisions of Section 42(2) of the NDPS Act has been made.

34. Since the case of the prosecution fails on two counts; (i) there is non-compliance of the provisions of Section 50 of the NDPS Act; and (ii) recovery of contraband article is doubtful, therefore, the point with regard to failure of the prosecution to keep the articles properly sealed need not be discussed.

35. For the reasons stated above, the prosecution has failed to prove its case against the accused appellant beyond all reasonable doubts and thus, the findings of the learned Special Judge convicting the accused appellant for the offence under Section 8/18 of the NDPS Act are liable to be set aside.

36. In the result, the appeal filed by the accused appellant Narayan is allowed and the Judgment dated 10-7-2000 and order of sentence dated 13-7-2000 passed by the learned Special Judge, NDPS Cases, Jodhpur are set aside and the accused appellant is acquitted of the charge under Section 8/18 of the NDPS Act. Since accused appellant Narayan is in jail, he be released forthwith, if not required in any other case.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com