

Saudan and anr. Vs. State of Rajasthan

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Court : Rajasthan

Decided On : Feb-20-2002

Reported in : 2002CriLJ4816; 2002(3)WLC275

Judge : Khem Chand Sharma, J.

Acts : [Narcotic Drugs and Psychotropic Substances Act, 1985](#) - Sections 8, 15, 41(2) and 51; [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 4, 4(2), 100, 102, 103, 165 and 313

Appeal No. : Crl. Appeal No. 383 of 2000

Appellant : Saudan and anr.

Respondent : State of Rajasthan

Advocate for Def. : Rizwan Alvi, Public Prosecutor

Advocate for Pet/Ap. : Omkar Singh and; Brahmanand Sandu, Advs.

Disposition : Appeal allowed

Judgement :

ORDER

Khem Chand Sharma, J.

1. Accused-appellants Saudan and Lalu have preferred this criminal appeal against the judgment and order dated 17-6-2000 passed by the Special Judge, NDPS cases (Additional Sessions Judge), Ramganjmandi, Kota, whereby the learned special Judge has found the accused-appellants guilty of having committed offence under Section 8/15 of the Narcotic Drugs and Psychotropic Substances Act (hereinafter to be referred as 'the Act') and accordingly, convicted both of them for the said offence and sentenced each of them to undergo rigorous imprisonment for 10 years with a fine of Rs. one lac each, in default there of, each to undergo simple imprisonment for two years.

2. Brief facts relevant for the purpose of disposal of this appeal are summarised as follow :

During night intervening 1 -11 -99 and 2-11-99, P.W. 7 Badri Lal, Sub-Inspector along with his team, while on patrolling duty, found the appellants sitting on the road near Kamalpura at about 4.00 a.m. who were having three bags (boras). On being asked about the bags, the accused replied that there were red chillies in the bags, but on suspicion, having touched the bags, It was felt that the bags might be containing the substance like powder of poppy straw. Thereupon, the Sub-Inspector informed the SHO, Police Station Modak on wireless of his suspicion. Having received the information, P.W. 10 Joclha Ram, SHO along with police party reached the place of incident. After informing the accused of their legal right to have their search conducted either in the presence of a Magistrate or in the presence of a Gazetted Officer and after both the accused consented for their search to be conducted by the SHO himself, the SHO searched the bags and found that all the three bags contained poppy straw powder in different quantity. He then took the samples of 500 grams from each bag and sealed the samples. The SHO prepared search and seizure memo Ex. P5 and arrested both the appellants. The SHO registered a case vide FIR Ex.P17 and rest formalities were completed.

3. On completion of investigation, a charge sheet was submitted against the appellants on 10-1-2000 for offence under Section 8/15 of the Act. The learned special Judge took cognizance and on 28-2-2000, the learned special Judge

framed charge against the appellants under Section 8/15 of the Act. The appellants denied the charge and claimed trial.

4. The prosecution, in support of its case, examined 10 witnesses and also exhibited some documents. The accused-appellants were examined under Section 313, Cr.P.C. In their explanation, the appellants have stated that the police has falsely involved them and that they had nothing with them to be suspected. However, the appellants did not produce any evidence in their defence.

5. On conclusion of trial, the learned special Judge found the prosecution case as alleged, proved and accordingly convicted and sentenced the appellants as aforementioned. Hence the present appeal.

6. I have heard learned Counsel for the parties and perused the judgment under appeal and the record of the case.

7. Learned counsel for the appellant, in assailing the conviction, has mainly confined his argument on the point that the prosecution has utterly failed to prove beyond reasonable doubt that the samples taken by the SHO remained intact right from the time of its seizure till the same reached the Forensic Science Laboratory for chemical examination. He argued that unless it is proved beyond reasonable doubt it cannot be inferred that the samples sent to the Forensic Science laboratory were the same which were taken out of the contraband alleged to have been recovered from the accused-appellants at the time of their search and seizure. He further argued that there is no evidence as to when the samples were taken to the Laboratory; for how many days the samples remained in the possession of Durga Prasad and in what condition. He contended with vehemence that neither the seized items were exhibited in the court during trial nor the same were got identified by the witnesses. In this regard, learned Counsel also submitted that prosecution has failed to prove that separate specimen seal was prepared at the spot and the same was sent to the Forensic Science Laboratory along with the samples.

8. Before dealing with the argument, it would be profitable to refer to the relevant evidence, oral as well as documentary.

9. P. W. 10 Jodha Ram, SHO has admitted in his cross-examination that Pratap Chand, SHO sent the samples to the Forensic Science Laboratory through one Durga Shanker, F.C., but the samples were returned back with the objection that Constable of the same Police Station, to which the samples belonged, should bring the samples. The witness further admitted that the objection was in writing and he did not include the same in the court file. He then admitted that the samples were again sent through P. W. 9 Dhanpal, Constable.

10. P. W. 1 Prem Behari Nagar, Incharge, Malkhan has not uttered a single word regarding sending of samples through Durga Prasad. What has been deposed by this witness is that he handed over three samples to Constable Dhanpal for depositing the same in the Forensic Science Laboratory.

11. P. W. 4 Pratap Chand, SHO, Police Station, Chachat has, in his cross-examination, admitted in specific terms that he did not send the samples to the Forensic Science Laboratory. P.W. 9 Dhanpal, Constable with whom the samples were again sent, has stated in his statement that he received the samples from Shri Prem Bihari, Head Constable on 29-11-1999 in sealed condition and deposited the same in the Forensic Science Laboratory on 30-11 -1999 and obtained receipt Ex. P 1.

12. Ex.P2 is the true copy of Malkhana register, a perusal of which shows that admittedly there is an endorsement to the effect that three samples marked A1, A2 and A3 were handed over to Durga Prasad for depositing the same in the Forensic Science Laboratory, but no date as to when these samples were handed over to said Shri Durga Prasad has been mentioned. Further, there is no endorsement in the Malkhana Register to the effect that Durga Prasad redeposited the samples with the objection of the Forensic: Science Laboratory. That apart, surprisingly enough, Shri Durga Prasad has not been examined as a witness during trial of the case.

13. From the evidence, oral as well as documentary discussed above, the only fact that has come out on record is that some - one handed over the samples to one Durga Prasad for depositing the same in the Forensic Science Laboratory. The important and significant features viz., (i) who handed over three samples to Durga

Prasad (ii) what were the objections of the Forensic Science Laboratory, and (iii) on which date said Durga Prasad re-deposited the samples, are completely missing from the prosecution evidence on record. Having scrutinized the evidence, I am of the considered opinion that the prosecution has not been able to prove beyond reasonable doubt that for how many days and in what condition the samples remained in the custody of Durga Shanker, with whom the samples were sent for depositing the same in the FSL, as per the note appended in the Malkhana Register. It is obligatory on the part of the officer empowered to ensure that the narcotic substance seized from the accused remained intact from the time of its seizure till the same was handed over to the Forensic Science Laboratory.

14. P. W. 7 Badri Lal, P. W. 8 Om Prakash and P. W. 10 Jodha Ram have admitted that no separate memo of seal impression used for the purpose of sealing the sample was prepared. A glance at the seal impressions put on memo of checking and seizure, Ex.P5 and Malkhana Register, Ex.P2 shows that a general seal of the Police Station was used for sealing the samples.

15. The net out come of the above discussion of the evidence is that right from the inception of the proceedings under the Act till the samples reached the Forensic Science Laboratory remained intact stands unproved. The link evidence as to the handing over of samples to Durga Prasad and re-depositing the same by him in the Malkhana is missing. Therefore, it must be concluded that the prosecution has failed to prove that the samples remained intact right from inception of the proceedings under the Act till the same were deposited in the Forensic Science Laboratory.

16. There is yet another serious infirmity in the prosecution case, which goes to the root of the case.

17. Section 51 of the Act provides that the provisions of the Code of Criminal Procedure, 1973 shall apply, in so far as they are inconsistent with the provisions of this Act, to all warrants issued and arrests, searches and seizure made under this Act.

18. Sub-clause (4) of Section 100 of the Code of Criminal Procedure provides that before making a search under this Chapter, the officer or other person about to make it shall call upon two or more independent and respectable inhabitants of the locality in which the place to be searched is situate or of any other locality if no such inhabitant of the said locality is available or is willing to be a witness to the search, to attend and witness the search and may issue an order in writing to them or any of them so to do.

19. Undisputedly, the provisions of Sections 100 and 165 of the Code of Criminal Procedure are not inconsistent with the provisions of NDPS Act and therefore, they are applicable for effecting search, seizure or arrest under the NDPS Act also. The words 'in so far as they are inconsistent with the provisions of this Act occurring in Section 51 of the NDPS Act' are significant.

20. Section 4, Cr.P.C. deals with trial of offences under the Indian Penal Code and other laws. Sub-section (2) of Section 4 makes it clear that all offences under any other law shall be investigated, inquired into, tried and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner of place of investigating, inquiring into, trying or otherwise dealing with such offences.

21. Thus, from a reading of the provisions referred to above, it is evident that the provisions of the Cr.P.C. are applicable where an offence under the Indian Penal Code or under any other law is being inquired into, tried and otherwise dealt with.

22. Now coming to the question of non-compliance of the provisions of Code of Criminal Procedure, it may be noted that this aspect whether failure to comply with these provisions in respect of search and seizure even up to that stage would vitiate the trial has been considered in catena of decisions and it has been enunciated that violation of the provisions, particularly that Section 100, 102, 103 or 165, Cr.P.C. strictly per se does not vitiate the prosecution case. In case if there being violation of such provisions, the courts have to see whether any prejudice was caused to the accused and in appreciating the evidence and other relevant factors it should be kept in mind that there was such a violation and from that, point of view, the evidence on record has to be evaluated.

23. In *State of Punjab v. Balbir Singh* (1994) 3 SCC 299 : 1994 Cri LJ 3702 their Lordships of the Supreme Court while considering the impact, of failure to comply with the provisions of Code of Criminal Procedure, set out conclusions in para 25 of the judgment. Clause (4-B) of the conclusions is relevant for the purpose, which is reproduced below :

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. then such search would not per se be illegal and would not vitiate the trial.

24. Their Lordships then held that the effect of such failure has to be borne in mind by the Courts while appreciating the evidence in the facts and circumstances of each case.

25. It, therefore, emerges that non-compliance of the provisions of Sections 100 and 165, Cr.P.C. would amount to an irregularity and the effect of the same on the main case depends upon the facts and circumstances of each case. In such a situation it has to be considered whether any prejudice has been caused to the accused and also to examine the evidence in respect of search in the light of the fact that these provisions have not been complied with, it is well settled that the testimony of a witness is not to be doubted or discharged merely on the ground that he happens to be an official but as a rule of caution and depending upon the circumstances of the case, the Courts look for independent corroboration. This again depends on the question whether the official has deliberately failed to comply with these provisions or failure was due to lack of time and opportunity to associate some independent witnesses with the search and strictly comply with these provisions.

26. Therefore, the effect of such non-compliance will have a bearing on the appreciation of evidence of the official witness and other material depending upon the facts and circumstances of each case.

27. In the light of above settled position and the law laid down in *Balbir Singh's* case 1994 Cri LJ 3702 (supra), it has to be seen whether in the present case the

course adopted by P.W. 10 Jodha Ram while conducting search and seizure was sufficient to meet out the requirements of the provisions of Section 100, Cr.P.C. It has also to be seen whether the failure on the part of P.W. 10 Jodha Ram to procure independent witnesses was deliberate or due to lack of time. For deciding the controversy, it would be profitable to refer to the relevant evidence.

28. P. W. 6 Kalyan Singh, Head Constable has stated in his examination in chief that P. W. 10 Jodha Ram directed him to procure two independent witnesses. The witness deposed that he contacted number of persons, but none prepared to be a witness. In cross-examination, the witness has admitted that he cannot disclose the names of those persons, who he requested to be-come independent witnesses. He further admitted that he did not disclose the names of those persons who refused to become independent witnesses, to the SHO. After submitting his report, Ex.P6 to the SHO, the SHO did not make any efforts to procure independent witnesses.

29. P. W. 7 Badri Lal, a witness to the search and seizure has stated in his statement that SHO sent Kalyan Singh to procure independent witnesses, but having failed to procure independent witnesses, he was made one of the independent witness. In cross-examination the witness has admitted that after the report to the effect that no independent witness was available, was submitted by Kalyan Singh, no request was made by P.W. 10 Jodha Ram for getting independent witnesses.

30. P. W. 10, Jodha Ram has deposed in his statement that he gave a requisition to Kalyan Singh to procure independent witnesses from Kamalpura. Kalyan Singh came back and reported that he contacted number of persons but none was prepared to participate in the proceedings under the NDPS Act.

31. Thus from the evidence discussed above, it is evident that P.W. 10 Jodha Ram, SHO never tried to procure independent witness at the time of conducting search and seizure. It is crystal clear from the prosecution evidence that P.W. 10 Jodha Ram simply observed formality by giving a requisition to P.W. 6 Kalyan Singh to procure independent witness. There is nothing in the prosecution evidence to show that who were the persons contacted and who refused to

become witnesses to the search and seizure, except the bald statement that independent witnesses were not available. The place where search was conducted was undisputedly a busy road approaching bus stand and village Pipalda, where there was frequent visit of the public at large and the vehicles were also passing through the road frequently, as has been admitted by P.W. 7 Badrilal and P.W. 8 Om Prakash in their cross-examination. It must therefore, be held that P.W. 10 Jodha Ram, SHO has deliberately failed to comply with these provisions despite having sufficient time and opportunity, which has caused serious prejudice to the accused appellants. It must also be held that in the absence of independent witnesses, the testimony of Badri Lal and Om Prakash, both police personnels, who were the witnesses of search and seizure does not inspire confidence.

32. For the reasons aforesaid, the appeal must succeed and it is accordingly allowed. The judgment of the trial Court convicting and sentencing the appellants under Section 8/15 of the Act is set aside and the appellants are acquitted of the offence charged. The appellants are in jail and they be released forthwith, if not wanted in any other case.