

State of Rajasthan Vs. Nasir

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Court : Rajasthan

Decided On : Nov-14-2008

Reported in : RLW2009(2)Raj1747

Judge : Mahesh Bhagwati, J.

Appellant : State of Rajasthan

Respondent : Nasir

Disposition : Appeal dismissed

Judgement :

Mahesh Bhagwati, J.

1. Challenged this appeal is to the judgment dated 11th March, 1997 rendered by Additional Sessions Judge No. 2, Kota (Special Judge, NDPS Act, Cases) whereby the accused respondent Nasir was not found guilty and acquitted in the offence under Section 8/21 of the Narcotics Drugs and Psychotropic Substance Act, 1985 (hereinafter referred to as 'Act, 1985').

2. The prosecution story is woven like this: That on 25th April, 1995 PW/2 Shri Kesari Chand, SHO Police Station Kaithuni Pole got an information that the accused Nasir was selling smack on Radhavilas Road. Shri Kesari Chand, having got this information, accompanied by the Police Officers, reached Radhavilas

Road near 'Jharne Ke Balaji' and found a person of identical features standing there, who having seen the police, endeavoured to flee. However, the Police nabbed him and asked about his identity whereupon he identified himself to be Nasir. Shri Kesari Chand after observing the legal formalities, took the search of the accused Nasir and found one foursquare cigarette packet in the right pocket of his trouser, which contained powder of gray colour. The powder was clinically examined and it was found to be smack which was 4.500 grams in weight. SHO Police Station Kaithuni Pole recovered the smack from the illegal possession of the accused Nasir, seized and sealed it vide memo Ex.P/3. He arrested the accused Nasir vide memo Ex.P/4, recorded the statements of the witnesses under Section 161 of Cr.P.C, registered the FIR Ex.P/10 sent the recovered smack for chemical examination to FSL Rajasthan Jaipur and after completion of investigation submitted a charge-sheet against him.

3. The accused was indicted for the offence under Section 8 read with Section 21 of the 'Act of 1985', who pleaded not guilty to the charge and claimed trial. The prosecution examined as many as 8 witnesses to prove its case. In his explanation under Section 313 of Cr.P.C., he claimed innocence and submitted that he was falsely implicated in this case. On completion of trial, the learned trial court did not find him guilty and acquitted of the charge as indicated hereinabove.

4. Heard the submissions advanced by the learned Public Prosecutor appearing for the State, and with her assistance, scanned the relevant material available on record.

5. The learned Public Prosecutor appearing for the State has canvassed that the prosecution evidence available on record has not been appreciated properly by the learned trial Court and it has been wrongly held that the provisions of Section 50 of the Act 1985 were not complied with by the search and seizure officer. She further contended that the recovery of 4.500 grams smack is very well proved from the possession of the accused and there is no reason to disbelieve the evidence of the police witnesses. Hence, the impugned judgment may be set aside and the accused respondent may be convicted for the alleged offence.

6. Having reflected over the submissions made by the learned Public Prosecutor and scanned the relevant material, the fact situation emerging in the case is as under:

(a) No independent witness has been examined by the prosecution.

(b) The search of the accused was taken by PW/2 Shri Kesari Chand in the presence of PW/7 Shri Abdul Mazid ASI and PW/1 Om Prakash Head Constable who themselves are the Police Officers.

(c) A perusal of the recovery memo Ex.P/3 reveals that the proceedings of search and seizure commenced at 2.25 PM and concluded at 3.30 PM.

(d) A further perusal of notice given to the accused under Section 50 of the Act 1985 reveals that it was given to him at 2.40 PM.

(e) The Police Officers have deposed that the notice under Section 50 was given to the accused prior to taking the search of his person.

7. It is well settled that provisions of Section 50 of the Act, 1985 are mandatory in nature in the light of the judgments rendered by the Hon'ble Apex Court in the case of Mohinder Kumar v. State of Panaji AIR 1985 SC 1157; State of Punjab v. Labh Singh 1997 Cr.L.R. (S.C.) 76 : RLW 1986(3) SC 136; Ali Mustfa v. State of Kerala : AIR 1995 SC244 and State of Punjab v. Balveer : 1994 CriLJ3702 . It is found mandatory to give a notice in writing to the accused and ask him if he so required, he could be taken to the nearest gazetted officer of any of the departments' mentioned in Section 42 of the Act, 1985 or to the nearest Magistrate. Sub-section (2) of Section 50 contemplates that if such requisition is made, the officer could detain the accused until he could take him to the gazetted officer or the Magistrate as the case may be.

8. In the case of Beckodan Abdul Rahim v. State of Kerala : 2002 CriLJ2529 , the Hon'ble Apex Court has held that the safeguards mentioned in Section 50 are intended to serve a dual purpose to protect the person against false accusation and frivolous charges as 'also to lend credibility to the search and seizure conducted by the empowered officer. Section 50 has been introduced with the

obvious intent to avoid any harm to innocent persons and to avoid raising of allegation of planting of fabrication by prosecuting authorities. It is now well settled by the catena of judgments of the Hon'ble Supreme Court as also this Court, that the provisions of Section 50 are mandatory in nature and the empowering authority is required to make strict compliance thereof. The Hon'ble Supreme Court has also held that if any gazetted Officer happens to be a member of the raiding party and he takes the search of the accused and recovers the contraband article, it will not be taken to be the strict compliance of the mandatory provisions of Section 50 of the Act of 1985.

9. Now advertent to evidence of prosecution witnesses PW/1 Omprakash, PW/2 Kesari Chand, PW/7 Abdul Mazid and search and seizure memo Ex.P/3, it is noticed that on account of non-availability of independent witnesses, PW/1 Omprakash Head Constable and PW/7 Abdul Mazid ASI were given the status of the independent witnesses and in their presence the search of the person of the accused was taken and the contraband article, i.e. smack was recovered from his possession which was duly sealed. As per the oral testimony of these three witnesses, the accused respondent was first given a notice in writing and he was asked, if he so required, he could be taken to the nearest Gazetted Officer or to the nearest Magistrate and when the accused consented for the search to be taken by SHO in the presence of PW/8 Bal Mukund Dy. S.P., PW/2 Kesari Chand took the search of his person and recovered 4.500 grams smack from his trouser he was wearing. But the documentary evidence is altogether contradictory to the oral testimony of these said witnesses. Memo Ex.P/2 reveals that the notice under Section 50 of the Act 1985 was given to the accused at 2.40 PM and his search was taken at 2.25 PM. This evinces that first the search of the person of the accused was taken at 2.25 PM and thereafter at 2.40 PM a notice under Section 50 of the Act 1985 with regard to taking his search was given to him. Thus, PW/2 Kesari Chand is found to have flouted the mandatory provisions of the Act 1985 and in utter disregard to the mandatory provisions of the Act, he took the search of the person of the accused and allegedly recovered the said smack from his illegal possession. It is highly surprising that the police failed to procure the presence of the independent witnesses, in whose presence the search could be taken and thus it casts doubt about the credibility of PW/2 Shri Kesari Chand. The reason is quite

obvious. Firstly, the evidence of the prosecution witnesses has been found to be contradictory to that of documentary evidence. Secondly, there being no evidence of the independent witnesses, the evidence of the police witnesses seems to be unreliable and untrustworthy. Since the prosecution story does not stand corroborated by the independent witnesses, in view of the facts and circumstances of the case emerging on record, the credibility of the police witnesses is not found to be untainted and unimpaired.

10. The learned trial court has rightly analysed and appreciated the documentary and oral evidence of the witnesses in para 13 of the impugned judgment and justly held that the mandatory provisions of the Act were violated by the search and seizure officer. The impugned judgment of the learned trial Court is found to be just and well meritted, with which I fully concur and I am in unison with the finding of acquittal arrived at by the learned trial court and the impugned judgment does not call for any intervention.

11. For these reasons, the State appeal being bereft of merits stands dismissed. The accused respondent is on bail. His bail bonds are discharged.