

State of H.P. Vs. Sukh Ram

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Court : Himachal Pradesh

Decided On : Jul-08-2002

Reported in : 2003CriLJ219

Judge : R.L. Khurana, J.

Acts : Code of Criminal Procedure (CrPC) , 1974 - Sections 100(4) and 165;
;Punjab Excise Act, 1914 Section 61(1); ;[Probation of Offenders Act, 1958](#) -
Section 4

Appeal No. : Crl. A. No. 326 of 1998

Appellant : State of H.P.

Respondent : Sukh Ram

Advocate for Def. : Vijay Bhatia and; Bhuvnesh Sharma, Adv.

Advocate for Pet/Ap. : M.C. Mandhotra, Addl. Adv. General

Judgement :

ORDER

R.L. Khurana, J.

1. By virtue of the present appeal preferred under Section 378, Code of Criminal Procedure, the State has assailed the acquittal of the respondent Sukh Ram,

hereinafter referred to as the accused, of the offence under Section 61(1)(a), Punjab Excise Act, as applicable to the State of Himachal Pradesh, as recorded by the learned Sessions Judge vide judgment dated 11-3-1998 passed in Criminal Appeal No. 16 of 1994.

2. Briefly stated, the prosecution story is this. On the night intervening 28/29-12-1989 28/29-12-1989 at about 12-30 a.m. PW-6 Sub-Inspector Hans Raj, the then Station House Officer. Police Station, Talai along with certain other police officials was present at Koserian in connection with routine patrolling and detection of excise offences. He received a secret information about the accused being indulged in illicit trade in liquor and that a large quantity of liquor could be recovered if a raid was immediately conducted. On the basis of such information a raiding party was constituted. PW-1 Bhajan Lal and PW-2 Durga Ram, the two independent witnesses were associated. A raid was conducted at the shop of the accused and during the course of search 54 bottles of 'Victor XXX Rum' were recovered. The bottles so recovered were seized and taken into possession after following the necessary procedure of sealing and sampling. In all 54 samples, that is, one sample from each of the 54 bottles recovered, were taken. Such samples on having been analysed were found to be of illicit liquor.

3. After completion of the investigation, the accused was sent up for trial for the offence under Section 61(1)(a), Punjab Excise Act, as applicable to the State of Himachal Pradesh. The accused pleaded not guilty and claimed trial.

4. In support of its case, the prosecution examined six witnesses in all. The defence put forth by the accused in his statement recorded under Section 313, Code of Criminal Procedure, is that of denial simpliciter and false implication. Two witnesses have been examined by the accused in his defence to show that villagers of Koserian are against him since having migrated from another place, he was carrying on his business at Koserian by raising a shop in Government land and that whenever police visits Koserian, it stays with PW-1 and PW-2.

5. The learned trial Court on consideration of the material placed before it, came to the conclusion that the offence under Section 61(1)(a), Punjab Excise Act, stood proved against the accused beyond reasonable doubt. It, therefore, convicted the

accused for such offence and sentenced him to simple imprisonment for six months and to pay a fine of Rs. 1000/-. In default of payment of fine, the accused was sentenced to undergo simple imprisonment for a further period of two months.

6. On appeal preferred by the accused, the learned Sessions Judge vide the impugned judgment set aside the conviction and sentence of the accused and acquitted him of the offence.

7. Feeling aggrieved by the acquittal of the accused as recorded by the learned Sessions Judge, Bilaspur, the State has approached this Court by way of the present appeal.

8. The learned Sessions Judge, while acquitting the accused has held that there has been non-compliance of the mandatory provisions of Sections 100(4) and 165(1) of the Code of Criminal Procedure, inasmuch as, the investigation officer had failed to join two independent witnesses during the course of search and that there has been failure to record the grounds to conduct the raid. Reliance was placed by the learned Sessions Judge on a decision of a learned single Judge of this Court in *State of H. P. v. Usha*, ILR (1989) Him Pra 190.

9. The provisions of Section 100(4) of the Code of Criminal Procedure have been duly complied with in the present case inasmuch as PW-1 Bhajan Lal and PW-2 Durga Ram were duly associated in the course of search. The learned Sessions Judge has held them not to be independent witnesses on the ground that the whole of residents of village Koserian were inimical towards the accused for his having encroached upon the Government land and were thus interested in ensuring his ejection. Another reason advanced by the learned Sessions Judge in discarding the evidence of PW-1 Bhajan Lal is that he had appeared as a prosecution witness in another case against the accused for the offence under Section 61(1)(a) of the Punjab Excise Act.

10. It may be noticed that neither PW-1 nor PW-2 is shown to have any personal enmity with the accused. PW-1 Bhajan Lal, admittedly, had appeared as a prosecution witness against the accused. The said case was registered subsequent to the present case. Therefore, such circumstance cannot be pressed

into service for discarding his testimony.

11. It has been held in *Ishwari v. State*, 1980 Cri LJ 571 (All) that the evidence of a witness cannot be discarded simply for the reason that he had appeared as a witness for the prosecution in one or two other cases.

12. The learned Sessions Judge on the facts and in the circumstances of the case has erred in concluding and holding PW-1 and PW-2 to be not independent witnesses.

13. Even otherwise, failure to comply with the provisions of Section 100(4), Code of Criminal Procedure will not invariably be fatal to the prosecution. This is because circumstances of the case may be such as to make it totally unreasonable and impracticable, if not impossible, to procure the presence of such witnesses. The possibility of such circumstance has been noted by the Hon'ble Apex Court in the *State of Maharashtra v. P.K. Pathak*, AIR 1980 SC 1224 : (1980 Cri LJ 923). Nevertheless, it would be for the prosecution to establish on the facts and in the circumstances of each case that meeting the requirements of Section 100(4), Code of Criminal Procedure, pertaining to association of two or more independent and respectable persons with the conducting of search was not possible or practicable. (See : *Smt. Prem Lata v. State of Himachal Pradesh* (1987) Cri LJ 1539 (Him Pra)).

14. In *Sunder Singh v. State of Uttar Pradesh*, AIR 1956 SC 411 : (1956 Cri LJ 801) it was held that assuming that the two witnesses associated during the course of search were not respectable inhabitants of the locality, that circumstance would not invalidate the search. It would only affect the weight of the evidence in support of the search and recovery. Hence, at the highest the irregularity in the search and recovery, in so far as the terms of Section 103, Code of Criminal Procedure, 1898 (now Section 100(4), Code of Criminal Procedure, 1973) had not been fully complied with, would not affect the legality of the proceedings. It only affected the weight of evidence which is a matter for the Courts of fact to see.

15. Even otherwise, it is by now well settled that evidence of the official witnesses has to be weighed in the same scale as any other testimony.

16. It is significant to note that there is nothing on the record to show that the official witnesses examined in the present case to prove the search and recovery had any animus or hostility against the accused. The cross-examination directed against them has not elicited anything worth the name which can possibly cause a dent in the prosecution case.

17. Coming to the question of non-compliance with the provisions of Section 165 of the Code of Criminal Procedure, admittedly the information received by PW-6 was reduced into writing by him. Nor the grounds of his belief were recorded by him.

18. In *Radha Kishan v. State of Uttar Pradesh*, AIR 1963 SC 822 : (1963 (1) Cri LJ 809, the accused therein was a postman. He and his father were living in the same house. Certain undelivered postal articles were recovered from an almirah in the house, the key of which was produced by the father. The accused was tried and convicted of an offence under Section 52, Post Office Act, for secreting postal articles. One of the contentions raised on behalf of the accused was that the search and seizure was illegal in as much as it was in contravention of the provisions contained in Sections 100(4) and 165 of the Code of Criminal Procedure. Repelling the contention, it was held by the Hon'ble Apex Court that assuming that the search was illegal, the seizure of the articles was not vitiated. It was further held that it may be that because of the illegality of search, the Court may be inclined to examine carefully the evidence regarding the seizure. But beyond this no further consequence ensues. It was also held that failure to comply with the provisions regulating searches may cast doubt upon the bona fides of the officers conducting the search, but when once the evidence has been believed, it is obviously no defence to say that the evidence was obtained in an irregular manner. There is nothing in law which makes such evidence inadmissible.

19. The above ratio was reiterated with approval in *State of Maharashtra v. Natwarlal Damodardas Soni*, AIR 1980 SC 593 : (1980 Cri LJ 429) as also in *Dr. Pratap Singh v. Director of Enforcement, Foreign Exchange Regulation Act (1985)* 3 SCC 72 : (AIR 1985 SC 989).

20. In view of the law laid down by the Hon'ble Apex Court, the ratio laid down by a learned single Judge of this Court in State of H. P. v. Usha, ILR (1989) Him Pra 190), reliance on which has been placed by the learned Sessions Judge, holding that non-compliance of the provisions of Section 165, Code of Criminal Procedure, is fatal, cannot be said to be a good law.

21. In the present case, recovery of 54 bottles of liquor from the conscious possession of the accused stands established on the record beyond a reasonable doubt. Nothing has come on the record to show as to what prejudice has been caused to the accused due to non-compliance of the provisions of Section 165, Code of Criminal Procedure.

22. As a result, the present appeal is allowed. The acquittal of the accused as recorded by the learned Sessions Judge is set aside and the accused is convicted for the offence under Section 61(1)(a) of the Punjab Excise Act.

23. On the question of sentence, it was contended on behalf of the accused that keeping in view the fact that the case pertains to the year 1989 and the fact that the accused has a large family to support, benefit of [Probation of Offenders Act, 1958](#), be given to the accused and he may be released on probation under Section 4 of the said Act.

24. It is worthwhile to note that after this case the accused was again involved in the offence under Section 61(1)(a) of the Punjab Excise Act, in the year 1991. In other words, in spite of the fact that the accused was facing trial in the present case, he appears to have been indulging in the illicit trade in liquor. He appears to have no regard for law. He, therefore, does not deserve to be dealt with under the [Probation of Offenders Act, 1958](#). The accused is, therefore, sentenced to rigorous imprisonment for six months and to pay a fine of Rs. 1000/-. In default of payment of fine, the accused shall undergo simple imprisonment for a period of one month.

25. The accused, who is on bail, is directed to surrender himself to his bail bonds before the learned trial Court within a period of four weeks from today to receive and serve out the sentence imposed upon him. On the failure of the accused to surrender as aforesaid, the learned trial Court shall proceed against him in

accordance with law. Case property to be dealt with as per directions of the learned trial Court.

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