

Ramjan Vs. State of U. P.

Ramjan Vs. State of U. P.

SooperKanoon Citation : sooperkanoon.com/918346

Court : Allahabad

Decided On : Oct-26-2010

Judge : Bala Krishna Narayana, J.

Appeal No. : Criminal Appeal No. 1295 Of 2010.

Appellant : Ramjan

Respondent : State of U. P.

Judgement :

1. Heard learned counsel for the appellant and learned A. G. A. for the State.
2. This appeal has been filed by the appellant, Ramjan against the judgement and order dated 13.1.2010 passed by Additional Sessions Judge, F. T. C. No. 1, Siddhartha Nagar convicting the appellant under Section 20 (b) (ii) (C) of N. D. P. S. Act, 1985 and sentencing him to undergo 10 years' R. I. and fine of Rs. 1,00000/- (One Lac Only) and in default of payment of fine further R. I. of two years.
3. Prosecution case in brief is that on 7.11.2008 Sub-Inspector, Imanwal Singh received information from Mukhbir Khas that one person was brining Nepali Charas from Krishna Nagar Bazar, Nepal to Barhni Bazar, India, whereupon Sub-Inspector, Imanwal Singh along with Lans Nayak No. 8657229 Hardev Singh and No. 050333501 Guard Sunil Kumar, B. Company Barhni Headquarter, Gorakhpur reached Barhni Bazar where 8847378 Nayak Mahesh Prabhar and 070091511

Guard Ashok Ghosh were already on duty in Lane No. 2 Barhni Bazar. At about 16.00 hours one person wearing dark blue jacket was seen walking towards Barhni Bazar from Krishna Nagar Bazar, Nepal and as soon as the said person reached near the no-mans' land, Guard Ashok Ghosh stopped him whereupon he became perplexed and attempted to run away but he was caught. Upon enquiry he disclosed that he was carrying Nepali Charas and his name was Ramjan, S/o Nanku and he was R/o village-Nai Sarai, P. S.-Hasanganj, Tehsil-Hasanganj, district-Unnao, U. P. The appellant was given an offer of being searched before a Magistrate or a Gazetted Officer, which he declined and he insisted that he may be searched by members of police patrol party which had apprehended him. The members of police party after searching each other, searched the appellant which yielded recovery of eight bars of Charas tied by a white plastic and brown colour tape which were kept in a white and black colour striped cloth stitched by a green colour thread which the appellant had wrapped around his body and concealed under the shirt and jacket which he was wearing. Guard Sunil Kumar procured a scale and upon actual measurement the weight of eight bars recovered from the person of the appellant was found to be four kg. The appellant failed to show that he had any authority to possess the Charas which was recovered from him and which was above the commercial quantity. Thereafter he was formally arrested. The recovered Charas together with the cloth in which it was wrapped, was seized. Samples of 25 gms. were taken from each of the eight bars and kept in a box which was wrapped in a cloth stitched and sealed. Specimen seal was prepared on the spot. Passers by were requested to become the witness of the seizure but they refused. Recovery memo was written on the spot by Sub-Inspector Imanwal Singh and read out to the appellant. Thereafter the signatures of the appellant and other members of the police party were obtained on the recovery memo. The information regarding arrest of the appellant was sent to the appellant's house. Pursuant to Chik F. I. R. registered at P.S.-Dherbua, district-Siddhartha Nagar on the basis of recovery memo Case Crime No. 830 of 2008 under Sections-8/20 of N. D. P. S. Act was registered against the appellant on 8.1.2008 at 12.30 A. M. The Investigating Officer prepared a site plan on 21.11.2008. Statements of witnesses under Section 161 Cr. P. C. were recorded. The samples drawn from the contraband articles allegedly recovered from the

appellant were sent to Vidhi Vigyan Prayogshala, Mahanagar, Lucknow through guard 241 (C.P.) Anand Kumar Prajapati along with docket prepared on 24.11.2008 by Superintendent of Police, Siddhartha Nagar. The report of chemical analyst dated 25.11.2008 indicated that the sample contained Charas. After investigation charge-sheet was submitted against the appellant under Sections 8/20 of N. D. P. S. Act on the basis of which the Court took cognizance and supplied the requisite documents to the appellant under Section 207 I. P. C.

4. Charge was framed against the appellant under Section 20 (b) (ii) (C) of N. D. P. S. Act on 7.1.2009. The appellant pleaded not guilty and claimed trial.

5. The prosecution in order to prove its case examined P. W. 1 Sub-Inspector Imanwal Singh, P. W. 2 Har Dev Singh B. company, Barhni, P. W. 3 Sub-Inspector Madan Mohan Yadav, P. W. 4 Constable Anand Kumar Prajapati, P. W. 5 Constable Suresh Prasad Cahurasia. Documentary evidence comprising of Ext. Ka 1 Recovery memo, Ext. Ka 2 seizure memo, Ext. ka 3 application for registering the F. I. R., Ext. Ka 4 first information report, Ext Ka 5 carbon copy of the G. D. entry, Ext. Ka 6 site plan, Ext. Ka 7 chargesheet, Ext. Ka 8 Docket dated 24.11.2008, Ext. Ka 9 chemical analyst's report, Ext. Ka 10 and 11 copy of the G. D. entries regarding departure from the post (Rawangi), Ext. Ka 12 G.D. Entry regarding "Wapsi" and Ext. Ka 13 photostat copy of the relevant extract of Malkhana register was filed by the prosecution.

6. The appellant during his examination under Section 313 Cr. P. C. denied his arrest and recovery of contraband articles from him as alleged by the prosecution and pleaded false implication due to enmity with local police.

7. The Additional Sessions Judge, F. T. C. No. 1, Siddhartha Nagar after considering the entire evidence on record, oral as well as documentary, by his judgement and order dated 13.1.2010 held the appellant guilty of having committed offence under Section 20 (b) (ii) (C) of N. D. P. S. Act on account of being found in unlawful possession of four Kg. Nepali Charas and sentenced him to undergo 10 years' R. I. and fine of Rs. 100000/- (one lac only) and in default of payment further two years' R. I.

8. Learned counsel for the appellant submitted that the appellant having been searched by the members of the police party on prior information that he was carrying illicit contraband articles and four kg. Nepali Charas having allegedly been recovered from the person of the appellant from a stitched cloth which was wrapped around his body and hidden under his shirt and jacket which he was wearing, it was incumbent upon the empowered officer to have informed the appellant that he had a statutory right of being searched before a Magistrate or a gazetted officer. This having not been done, alleged recovery of contraband article from the appellant was rendered suspect and the conviction and sentence of the appellant based on the recovery made without complying with the accused-appellant's right emanating from Section 50 (1) of N. D. P. S. Act is bad and unsustainable in the eyes of law. He further contended that the contraband articles which were seized from the person of the appellant in a search conducted in violation of the safeguards provided under Section 50 of the Act cannot be used as evidence of proof of fact of unauthorized possession of the contraband articles against the accused and his conviction based on a such illegal recovery of illicit articles is wholly against the law more so when despite the alleged recovery having been made in a public place and during day-time, there was no independent witness of the recovery.

9. Learned counsel for the appellant further submitted that inordinate and unexplained delay of more than twenty hours in lodging the first information report although the distance between the place of occurrence and the police station is less than seven Kms., gives rise to a very strong presumption that the appellant was neither arrested at the place or in the manner as alleged by the prosecution nor any recovery was made from him at the place indicated in the recovery memo and the applicant has falsely been implicated in the present case.

10. Learned counsel for the appellant lastly contended that the illicit contraband articles allegedly recovered from the appellant having not been produced before the Court and there being no other legally admissible evidence on record indicating that the illicit contraband articles which were produced before the Court, were the same which were allegedly recovered from the appellant the finding recorded by the court below that the appellant was found in possession of the illicit

Charas, is totally erroneous and wholly unwarranted.

11. Per contra, Sri N. D. Rai, learned A. G. A. made his submissions in support of the impugned judgement. Sri Rai strenuously urged that not only the provisions of Section 50 (1) of the N. D. P. S. Act were substantially complied with but there was ample evidence on record indicating that the appellant had been arrested and illicit contraband articles were recovered from him in the manner as alleged in the first information report.

12. I have very carefully examined the submissions advanced by the learned counsel for the parties and perused the impugned judgment as well as the record of Special Criminal Case No. 45 of 2008; State Versus Ramjan and find that the submissions made by learned counsel for the appellant have force and the same are liable to be accepted whereas those advanced by learned A. G. A. have no substance.

13. On behalf of the prosecution for proving the arrest and recovery of the contraband articles from the appellant, P. W. 1 Sub-Inspector Imanwal Singh and P. W. 2 Nayak Har Dev Singh B. Company Barhni were examined as witnesses of facts. P. W. 1 proved the recovery memo (Ext. Ka 1), seizure memo (Ext. Ka 2) and first information report (Ext. Ka 4). He also proved the white cloth Material Ext. 1, Check cloth Material Ext. 2 and the recovered Charas Material Ext. 3. P. W. 2 Nayak Har Dev Singh in his testimony supported the prosecution version as narrated by P. W. 2. P. W. 3 Investigating Officer, Madan Mohan Yadav proved Ext. Ka 6 site plan, Ext. Ka 7 charge-sheet as well as the copy of the chik F. I. R. and G. D. entries Ext. Ka 4 and 5 respectively. P. W. 4 Anand Kumar Prajapati stated in his testimony that he was handed over the sealed sample drawn from the illicit contraband articles recovered from the appellant along with the Docket for being delivered to Vidhi Vigyan Prayogshala, Mahanagar, Lucknow. He delivered the sample along with Docket to Vidhi Vigyan Prayogshala, Mahanagar, Lucknow on 25.11.2008. He proved his signatures on the Docket (Ext. Ka 8).

14. P. W. 5 Constable Moharir Suresh Prasad Chaurasia proved the entry made by Head Moharir Vishwas Kumar Chaturvedi in the Malkhana register of Police Station-Dhibarua, district-Siddhartha Nagar of year 2008 at serial no. 567

regarding the deposit of contraband articles recovered from the appellant on the basis of which Case Crime No. 830 of 2008 was registered against the appellant.

15. After going through the recovery memo (Ext. Ka 1), seizure memo (Ext. Ka 2), first information report (Ext. Ka 4) as well as the statements of P. W. 1 and P. W. 2, I have no hesitation in holding that before searching the appellant, the empowered officer who had prior information that suspect accused was carrying Nepali Charas, did not inform the appellant that he had a right of being searched before a Magistrate or a Gazetted Officer. The appellant was merely informed by the empowered officer that he had an option of being searched before a Gazetted Officer or a Magistrate. Violation of Section 50 (1) of the N. D. P. S. Act is writ large on the face of record.

16. The record further shows that the illicit contraband articles were hidden by the appellant in a cloth which was stitched and which he had wrapped around his body and concealed under the clothes which he was wearing. Thus, the admitted position which emerges, is that the alleged contraband articles were recovered from the person of the appellant and since the search of the appellant was made by empowered officer on prior information that the appellant was in possession of unauthorized contraband articles, it was all the more imperative for the empowered officer to have intimated the appellant of his right emanating from Section 50 (1) of N. D. P. S. Act.

17. A Constitutional Bench of Hon'ble Apex Court in the case of State of Punjab Versus Baldev Singh reported in (1999) 6 SCC 172: 1999 SCC (Cri) 1080 while examining the effect of failure to comply with the procedural safeguards contained in Section 50 (1) of N. D. P. S. Act held in the following terms:

"57. On the basis of the reasoning and discussion above, the following conclusions arise:

(1) That when an empowered officer or a duly authorized officer acting on prior information is about to search a person, it is imperative for him to inform the person concerned of his right

under sub-section (1) of Section 50 of being taken to the nearest gazetted officer or the nearest Magistrate for making the search. However, such information may not necessarily be in writing.

(2) That failure to inform the person concerned about the existence of his right to be searched before a gazetted officer or a Magistrate would cause prejudice to an accused.

(3) That a search made by an empowered officer, on prior information, without informing the person of his right that if he so requires, he shall be taken before a gazetted officer or a Magistrate for search and in case he so opts, failure to conduct his search before a gazetted officer or a Magistrate, may not vitiate the trial but would render the recovery of the illicit article suspect and vitiate the conviction and sentence of an accused, where the conviction has been recorded only on the basis of the possession of the illicit article, recovered from his person, during a search conducted in violation of the provisions of Section 50 of the Act.

(4) That there is indeed need to protect society from criminals. The societal intent in safety will suffer if persons who commit crimes are let off because the evidence against them is to be treated as if it does not exist. The answer, therefore, is that the investigating agency must follow the procedure as envisaged by the statute scrupulously and the failure to do so must be viewed by the higher authorities seriously inviting action against the official concerned so that the laxity on the part of the investigating authority is curbed. In every case the end result is important but the means to achieve it must remain aboveboard. The remedy cannot be worse than the disease itself. The legitimacy of the judicial process may come under a cloud if the court is seen to condone acts of lawlessness conducted by the investigating agency during search operations and may also undermine respect for the law and may have the effect of unconscionably compromising the administration of

justice. That cannot be permitted. An accused is entitled to a fair trial. A conviction resulting from an unfair trial is contrary to our concepts of justice. The use of evidence collected in breach of the safeguards provided by Section 50 at the trial, would render the trial unfair.

(5) That whether or not the safeguards provided in Section 50 have been duly observed would have to be determined by the court on the basis of the evidence led at the trial. Finding on that issue, one way or the other, would be relevant for recording an order of conviction or acquittal. Without giving an opportunity to the prosecution to establish, at the trial, that the provisions of Section 50 and, particularly, the safeguards provided therein were duly complied with, it would not be permissible to cut short a criminal trial.

(6) That in the context in which the protection has been incorporated in Section 50 for the benefit of the person intended to be searched, we do not express any opinion whether the provisions of Section 50 are mandatory or directory, but hold that failure to inform the person concerned of his right as emanating from sub-section (1) of Section 50, may render the recovery of the contraband suspect and the conviction and sentence of an accused bad and unsustainable in law.

(7) That an illicit article seized from the person of an accused during search conducted in violation of the safeguards provided in Section 50 of the Act cannot be used as evidence of proof of unlawful possession of the contraband on the accused though any other material recovered during that search may be relied upon by the prosecution, in other proceedings, against an accused, notwithstanding the recovery of that material during an illegal search.

(8) A presumption under Section 54 of the Act can only be raised after the prosecution has established that the accused was found to be in possession of the contraband in a search conducted in accordance with the mandate of Section 50. An illegal search cannot entitle the prosecution to raise a presumption under Section 54 of the Act."

18. For the aforesaid reasons and in view of the law laid down by the Apex Court on the issue in the case of Baldev Singh (supra), I have no hesitation in holding that there was no compliance with the mandatory requirement of Section 50 (1) by the officer who has searched the appellant and recovered illicit Charas from him and as such the illicit contraband articles recovered from the person of the appellant during a search conducted in violation of the safeguards provided under Section 50 (1) of N. D. P. S. Act, could not have been used as evidence of proof of unlawful possession of the contraband articles against the appellant and on the basis of such illegal recovery, appellant could not have been convicted for the offence punishable under Section 20 (b) (ii) (C) of N. D. P. S. Act.

19. Another interesting aspect of the matter which renders the recovery of contraband articles from the appellant as alleged by the prosecution suspicious, is the fact that although the applicant was apprehended and searched at a public place and during day-time but there is no independent witness of the recovery. The prosecution witnesses have attempted to explain the said omission by saying that several passers by were stopped but they refused to be witnesses of the recovery. It is strange that the empowered officer did not make any effort to note down the names and addresses of the persons whom he approached for witnessing the recovery. This omission on the part of the empowered officer has further rendered the prosecution case extremely doubtful.

20. Unexplained delay of more than twenty hours in lodging the first information report against the applicant although the distance between the place of occurrence and police station is hardly seven Kms. further strengthens the suspicion that the applicant has falsely been implicated in the present case.

21. The judgment of lower appellant court is also liable to be set-aside on the ground that the recovered contraband articles which were allegedly recovered from the appellant were never produced before the trial court, although P. W. 1 attempted to prove that the sealed contraband articles which were produced before the court, were the same which were recovered from the appellant but in his own statement he has admitted that the Case Crime Number mentioned on the seal of the packet containing contraband articles allegedly recovered from the appellant and which were produced before the trial Court, was 45 of 2008 whereas the number of the case which was registered against the appellant on the basis of the recovery memo (Ext. Ka 1) was Case Crime No. 830 of 2008 under Section 8/20 of N. D. P. S. Act.

22. Thus, from the above it is apparent that the contraband articles which were produced before the trial Court were recovered in some other criminal case and had no connection with the present case. In my opinion, the prosecution has totally failed to prove that the contraband articles produced before the court were the same, which were recovered from the appellant. Hence the finding of the court below that four Kg. illicit Charas was recovered from the person as the appellant, is without any evidence and is accordingly set aside.

23. Although the learned A. G. A. advanced elaborate arguments but he could not satisfy the Court that there has been any compliance with the mandatory requirement of Section 50 (1) of N. D. P. S. Act and the contraband articles which were produced in the trial Court, were the same which were allegedly recovered from the appellant.

24. For the aforesaid reasons the conviction of the appellant under Section 20 (b) (ii) (C) of N. D. P. S. Act, cannot be sustained. The appeal is accordingly allowed. The conviction and sentence imposed vide judgement dated 13.1.2010 is set aside. The appellant is acquitted. The appellant who is in jail, shall be released forthwith.