

Palaswami Vs. State of Karnataka

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Court : Karnataka Dharwad

Decided On : Aug-22-2011

Judge : B.V. Pinto

Appeal No. : Criminal Appeal No. 2634 of 2011

Appellant : Palaswami

Respondent : State of Karnataka

Advocate for Pet/Ap. : For the Appellant: Holeyannavar, Advocate. For the Respondent: Anand K. Navalgimath, High Court Government Pleader.

Judgement :

B.V. PINTO, J.

1. This appeal is filed challenging the judgment dated 22.03.2011 passed by the Principal District and Sessions Judge and Special Judge, Dharwad in Special N.D.P.S.C.C.No.1/210 convicting the appellant for an offence under Section 20(b)(ii)(c) of The Narcotic Drugs and Psychotropic Substances Act, 1985 ('The Act' for short) and sentencing him to undergo R.I. for 10 years and to pay a fine of `1,00,000/-, in default to undergo R.I. for two years.

2. It is the case of the prosecution that on 11.01.2010 at about 19.30 hours, the accused was found in possession of 21 kgs of Ganja in two air bags in the old bus stand, Hubli, without any permission and hence is charged for having committed

the offence under Section 20(b)(ii)(c) of the Act. The prosecution in order to prove the case has examined in all 10 witnesses and got marked Exs.P1 to P14 and produced M.Os.1 to 4. The defence of the accused was one of total denial. The learned Special Judge after hearing the prosecution and the defence, found the accused guilty and convicted him as aforesaid. The convicted accused has filed this appeal.

3. Heard Sri G.A. Holeyannavar, learned Counsel for the appellant and Sri. Anand K. Navalgimath, learned HCGP for the respondent-State.

4. The learned Counsel for the appellant submits that the complainant-police have not followed the mandatory provisions prescribed under Sections 50 and 42 of the Act and therefore the judgment and conviction is liable to be set aside. He has further stated that the independent witnesses to the mahazar PWs 2 and 3 have turned hostile to the case of the prosecution and therefore, the case is based only on the evidence of the police officials. It is further submitted by him that the complaint-Ex.P9 does not refer to the fact that before searching the appellant, the police have informed him his right to be searched in the presence of the Gazetted Officer. Hence the entire proceedings are vitiated. Therefore, he submits that the accused may be acquitted by allowing this appeal. He refers to the following rulings:

i. 2005 Cri. L.J. 595 (*Rajendra Prasad Vs. State of Bihar*), the Patna High Court held as under:

“Narcotic Drugs and Psychotropic Substances Act (61 of 1985), Ss. 20(b), 22-Illegal possession of ganja-Conviction and sentence-Allegation that three bags containing ganja were-seized from possession of accused-Most of prosecution witnesses had turned hostile-Although official witness stated that three bags were seized from possession of accused-There was no evidence to show that those bags were kept in safe custody and sample was sent for chemical examination-Prosecution failed to establish its case beyond all reasonable doubts. As article seized from possession of accused was less than commercial quantity and was not psychotropic substance, conviction and sentence was illegal.”

ii. 2009 Cri. L.J. 3284 (*Sidhartha Goutam Vs. State of Chhattisgarh*), The Chhattisgarh High Court held as under:

“Narcotic Drugs and Psychotropic Substances Act (61 of 1985), S.20(b)(ii)(c)-illegal possession of contraband-Proof-Alleged recovery of 11 gunny sacks containing Ganja-Like substance inside Santro car-Not produced before Court during trial-Witnesses not supporting prosecution-Whereas prosecution failed to prove preservation of sanctity of sealed samples till they reached to Forensic Science Laboratory (FSL)-Report of FSL cannot form basis for conviction of accused persons who are entitled to benefit of doubt-Also order of confiscation of Santro car be set aside.”

iii. 2011 Cri. L.J. 3407 (*Jagdish and Anr. Vs. State of Rajasthan*), Rajasthan High Court held as under:

“Narcotic Drugs and Psychotropic Substances Act (61 of 1985), S.42-Sending of information to superior officer-Proof-Prosecution failed to produce police personnel who might have carried information at police station to superior officer-Adverse inference can be drawn against prosecution-Only wireless information sent but no indication that said information was sent in writing-Mandatory provisions of S.42 thus, not followed-Superior Police Officer not duly informed also for reasons to belief of police officer for searching house of accused as provided under proviso to-S.42(2)-Accused deserved to be acquitted.”

iv. 2011 SAR (Criminal) 568 (*State of Rajasthan Vs. Tara Singh*), the Hon'ble Supreme Court held as under:

“Narcotic Drugs and Psychotropic Substances Act, 1985-Sec.8/15-In a prosecution relating to the Act the question as to how and where the samples had been stored or as to when they had dispatched or received in the laboratory is a matter of great importance-Respondent was searched and the bag that he was carrying was found to contain 8 k.g. of opium-Conviction by trial Court-High Court allowed the appeal on the ground that there was no evidence as to when the sample had been sent to laboratory-Hence this appeal-Whether the High Court was justified in holding that sanctity of the sample had been compromised which

cast a doubt on the prosecution story-Held: Yes, appeal dismissed.”

v. AIR 2000 SC 733 (*Kalayath Nassar Vs. State of Kerala*), the Hon’ble Supreme Court held as under:

“Narcotic Drugs and Psychotropic Substances Act (61 of 1985)-Section 50-Requirements of-Accused not informed of his right to be searched before gazetted officer or Magistrate-Non-compliance with S.50-Prejudice caused-Search, vitiated-Fact, that accused did not make a request, on his own does not dispense with requirements of compliance with S.50.”

vi. AIR 2000 SC 2790 (*Ahmed Vs. State of Gujarat*), the Hon’ble Supreme Court held as under:

“It cannot be said that the requirement of compliance of S.50 will not arise, if a search is going to be made by an empowered officer who happens to be a gazetted officer. To ensure fairness in the search itself and for compliance of S.50 of the Act, no differentiation can be made whether the search is being made by the empowered officer, who obviously is an officer of a gazetted rank or the authorised officer, who may be a subordinate officer to whom the empowered officer authorises.”

5. The learned High Court Government Pleader on the other hand submits that PW10 is the Assistant Commissioner of Police, Hubli, who is the Gazetted Officer. He submits that Ex.P2, which is the spot mahazar clearly indicates that A.C.P. was present at the time of seizure of Narcotic Drug and therefore, it is sufficient compliance of Section 50 of the Act. Ex.P8 is the document showing the option given to the accused to be searched by the Gazetted Officer and therefore, the mandatory provision under Section 50 of the said Act is complied with. He further submits that, on the basis of the evidence of PWs 1 to 10, the prosecution has successfully proved that the accused was in possession of a Narcotic Drug. Ex.P5 is the certificate issued by the Forensic Science Laboratory, which clearly indicates that the material possessed by the appellant is a Narcotic Drug. Hence he submits that the conviction recorded by the learned Special Judge is based on the evidence on record and does not call for interference and hence he submits

that the appeal may be dismissed.

6. The prosecution case is commenced on the basis of a complaint registered as per Ex.P9. It is stated in the said complaint filed by the Inspector of Police, Upanagar Police Station, Hubli that on 11.01.2010 at about 6.30 pm, when he was in the police station, he received a credible information that one person of Tamilnadu region is holding two black coloured air bags in the old bus stand and the said bags contained Ganja. Immediately, he recorded the same in his station diary and after informing the A.C.P. of Hubli North Division, he went to the scene of occurrence. It was found that about 19.25 pm at a place where Bangalore buses were stopping in the old bus stand, a person was standing with two black air bags in two of his hands. Hence they went near the said person. It was found that the said person did not know Kannada language and was knowing Tamil language. He disclosed his name as Palaswamy; resident of Kambam village, Tamilnadu. When he was questioned, he did not give proper answer regarding the bags in his hands. When he was questioned repeatedly, he revealed that bags contain Ganja. Thereafter, the bags were searched and it was found that the bags contained Ganja. When the Ganja was found wet, the accused was questioned for which the accused answered that he had sprinkled water over the Ganja in order that it will not emanate any odour. Thereafter, the inspector summoned the weighing machine and on weighing the contents of the bags, it was found that one bag contained Ganja weighing 10 kgs valued at `5,000/-. Another bag contained Ganja weighing 11 kgs valued at `5,500/-. Thereafter, a sample 200 gms was removed and packed separately and sealed by Government seal. The remaining Ganja was also sealed and packed. The accused was arrested and thereafter, a case is registered. On completion of investigation, the charge sheet came to be filed.

7. PW1. Anand is the constable working under the Inspector of Police. He has stated regarding the contents of the complaint as mentioned above and the seizure of Ganja from the possession of the accused. It is elicited in the evidence of PW.1 that the accused was questioned whether he could be searched by the Officer who was present before him or he desires to be searched in the presence of a Gazetted Officer. Since the accused gave his permission for search being made by the ACP, search was conducted, whereafter, the Ganja was, recovered

from the possession of the accused. PW1 has been cross-examined and it was suggested to him that no such case has been detected by the Inspector and that he is deposing falsely at the instance of the Inspector.

8. PW2 Ravi is the auto driver. He has turned hostile to the case of the prosecution. PW3 Shiripad is a businessman who has also not supported the case of the prosecution. PW4 Kotresh Parashuramappa is the Assistant Chemical Examiner working at Regional Assistant Chemical Examiner Lab (RACEL), Dharwad. He has stated that the contents sent by the Inspector for examination is Ganja and has issued his report as per Ex.P5. PW5 Narayan is the constable who has carried FIR to Court. PW6 Fakirappa is another constable who has carried the Ganja bags to the Regional Forensic Science Laboratory, Dharwad, PW7 Basappa is the constable who was present along with PW1 and the Inspector. However, he has not stated regarding the, presence of Gazetted Officer at the time of seizure of the Narcotic Drug from the possession of the accused. PW8 Rajugouda is the Inspector of Police who had conducted the raid, seized the articles and the drug and has arrested the accused. In the cross-examination, it is suggested that bus stand is a public place where several people were moving and there are shops in the surrounding areas. It is suggested to him that in the complaint he has not stated regarding the presence of Gazetted Officer. PW8 has stated that in the mahazar, a mention is made regarding the presence of Gazetted Officer. PW9 Sandeep is the PSI, who has registered the case as per Crime No.8/2010 on 11.01.2010. He has conducted part of investigation in this case. PW10 Ninganagouda is the ACP, Hubli North Division. He has stated that on 11.01.2010, at about 6.45 pm, he was present when the accused was apprehended along with Narcotic Drug, namely, Ganja and that the accused was searched in his presence. He has stated that he is a Gazetted Officer and is an Authorised Officer under Section 50 of the NDPS Act. He has conducted investigation and filed the charge sheet in this case. In the cross-examination, it is elicited from PW10 that it was not disclosed to the accused straight away that he is the Gazetted Officer and that no question was asked to the accused as to whether he can make a search of the person of the accused. However, he has stated that since the accused did not know Kannada language, he had talked to the accused through PWs 8 and 7. It is suggested to him that the accused was not informed

about his right to be searched in the presence of Gazetted Officer.

9. It is from the evidence of the prosecution witnesses that the learned Special Judge has convicted the accused and sentenced him as aforesaid.

10. On a careful consideration of the entire materials on record, it is seen that, in the complaint it is not stated that the raiding party had informed the accused about his right to be searched in the presence of a Gazetted Officer. It is only found in the subsequent mahazar that he was questioned as to whether he has any objection to be searched by PW10 who is a Gazetted Officer.

11. Nevertheless in the entire prosecution papers it is not found that the accused was informed about his right to be searched by a Gazetted Officer and therefore, the procedure under Section 50 of the Act is not complied with, which is mandatory as observed by the Hon'ble Supreme Court in the decisions cited above. In that view of the matter, I am of the opinion that the appellant is entitled for an Order of acquittal for noncompliance of the mandatory provisions of law.

12. In the result appeal is allowed and the order of conviction and sentence passed against the appellant is set aside. The appellant is acquitted of the offence under Section 20(b)(ii)(c) of Act and as the appellant is in custody, he shall be set at liberty forthwith, if not required in any other case. Office is directed to transmit the operative portion of the judgment to the concerned Sessions Judge and Central Jail, Dharwad forthwith.

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