Rulia Vs The State

Court: High Court Of Punjab And Haryana At Chandigarh

Date of Decision: Sept. 11, 1963

Acts Referred: Criminal Procedure Code, 1898 (CrPC) â€" Section 165

Hon'ble Judges: Dua, J

Bench: Single Bench

Advocate: U.D. Gour, for the Appellant; M.R. Punj, for the Respondent

Final Decision: Dismissed

Judgement

Dua, J.
These three criminal revisions (Criminal Revisions Nos. 68, 88 and 303 of 1963) have been bracketed together because they

were stated by the counsel for the Petitioners to involve same question of law.

2. In Criminal Revision No. 63 of 1963 the only point raised by the learned Counsel is that there is a violation of Section 165, Code of Criminal

Procedure and this violation vitiates the trial. In order to appreciate the contention the broad facts may be stated.

3. Rulia accused-Petitioner has been convicted by a Magistrate 1st Class, Rohtak u/s 61 of the Punjab Excise Act (No. 1 of 1914). On 31st

March, 1962 Mani Ram, Assistant Sub-Inspector (P.W. 4) received some secret information in pursuance whereof he formed a raiding party by

joining Kadara P. W. 1, Darya Lambardar P. W. 2 and Pirthi P. W. 3 ah of village Bohar, and failed the house of the accused in the same village

and found him working on a still and manufacturing illicit liquor. The fire in the hearth was burning and the whole of apparatus was actually fixed

and placed in working condition. The liquor after distillation from Exhibit P. 1 which contained lahan was being collected in a receiver P. 3 in watch

about 12 oances(sic) of liquor was found. One bottle of liquor was also lying close to the working still. The lahan in Exhibit P. 1 weighed about 20

seers. The trial Court considering the prosecution witnesses to be respectable and independent found no reason to disbelieve their testimony. They

were also supported by the Assistant Sub-Inspector. Finding the accused guilty he was convicted and ordered to undergo rigorous imprisonment

for six months and also to pay a fine of Rs. 700/-, in default to undergo rigorous imprisonment for further period of three months. It is clear that

before the learned Magistrate no point on the basis of alleged violation of the provisions of Section 165 Code of Criminal Procedure was raised.

4. An appeal was taken to the Court of the learned Sessions Judge but in the grounds of appeal, a copy of which has been filed in this Court, again

no point was sought to be made on the basis of violation of Section 165 of the Code but during arguments it appears that the very first point raised

related to the alleged contravention of Section 165 of the Code. It was argued that the search was in contravention of this provision and, therefore,

the entire proceedings were vitiated. In support of this contention reliance was placed on a Bench decision of the Lahore High Court in AIR 1946

456 (Lahore) . It was observed in that case by Marten J. that the safeguards incorporated in Section 165 are mandatory and not directory and

must be carried out immediately and fully or as nearly as they can be in the exigencies and circumstances of each case. Unless this is done, the

search, according to the learned Judge, would be without jurisdiction and bad in law. Bhandari J. who added a note of his own observed that

having regard to the language of Section 165 and the general object intended to be secured by that section there was no doubt that it must be

deemed to be obligatory with an implied nullification for disobedience. The learned Sessions Judge, however, distinguished the reported case

observing that Section 165 is applicable only in those cases where during the investigation of a case some recovery is to be made from some house

and that it does not apply to cases where on secret information a raid is conducted and the articles are recovered the possession of which is

prohibited. The learned Sessions Judge continued that the recovery does not become illegal even if it be accepted that the search was not properly

made.

5. On revision the learned Counsel for the Petitioner has strongly and eloquently assailed the conclusion of the learned Sessions Judge. He has in

support of his contention relied on a decision of the Supreme Court in The State of Rajasthan Vs. Rehman, , by Gajendragadkar and K. Subba

Rao JJ. and specific reference has been made to paragraph 7 of the judgment which contains a discussion on the provisions of the Code of

Criminal Procedure regulating the mode of search. After dealing with the four groups of sections regulating the searches authorised under the Code

and considering the scope and effect of Rule 201 of the Central Excise Rules with which the Court was directly concerned, it was observed that

the provisions of Section 165 of the Code require to be followed in the matter of searches under Rule 201. The Court then proceeded to observe

as follows:

Section 165 of the Code lays down various steps to be followed in making a search. The recording of reasons is an important step in the matter of

search and to ignore it is to ignore the material part of the provisions governing searches. If that can be ignored, it cannot be said that the search is

carried out in accordance with the provisions of the Code of Criminal Procedure: it would be a search made in contravention of the provisions of

the Code.

For the reasons mentioned, we hold that the search made by the Deputy Superintendent in the present case in contravention of the provisions of

Section 165 of the Code was illegal.

Reference was next made to an unreported decision of this Court by S.B. Capoor J. in Mal Singh v. State Cr A No. 557 of 1961. There, the

offence which was subject-matter of the case fell u/s 5 of the Explosives Substances Act and relying on the Lahore decision in AIR 1946 456

(Lahore) and non-compliance with the provisions of Section 165 of the Code, the alleged recovery was held to be suspect. This decision, as I

read it, merely proceeds on the view that the provisions of Section 165 are mandatory and not that non-compliance with those provisions would

vitiate the whole proceedings. The counsel then read out some passages from AIR 1946 456 (Lahore) and then cited AIR 1943 28 (Lahore) by

Din Mohammad and Blacker JJ. It was observed there that the combined effect of the provisions of Sections 94, 155 and 165 Cr. P. C. is that

without an order of a competent Magistrate a police officer cannot investigate a non-cognizable case, and even if he is so authorised he has to

observe the formalities as laid down in Sections 94 and 165 before he can compel the production of any document or seize any incriminating

article.

6. On behalf of the Respondent it has been stressed that Section 165 is not applicable to the case in hand because there is no question of obtaining

anything, necessary for the purposes of an investigation into any offence, which may be found in any place of which search is made. Here the police

officer with a raiding party went to the house of the accused and saw him actually working a still and it is on the basis of this evidence that the

accused has been convicted. This argument has certainly some merit.

7. The Petitioner''s learned Counsel, however, without conceding to the Respondent''s contention submits that the other two connected cases are

different and, therefore, in those cases Section 165 would be clearly applicable. It is desirable at this stage to state the facts of those two cases as

well.

8. In Criminal Revision No. 88 of 1963 the same accused Rulia while in police custody on 31st March 1962 stated to the Assistant Sub-Inspector

Mani Ram that he had kept concealed one bottle of liquor in the southern corner from the entrance of his house which he could get recovered.

When confronted with these facts the learned Counsel for the Petitioner had to concede that this case is in no wise different from the first one so far

as the question of the applicability of Section 165 goes.

9. Coming now to Cr. R. 303 of 1963, Passa, Bhim Singh and Daya Nand, all less than 20 years old, were also found working a still and

manufacturing illicit liquor in the fields of village Sanghi in pursuance of a raid organised by S. H. O. Ram Rang. Passa was 20 years old, Daya

Nand 17 years old and Bhim Singh 15 years old. Passa ran away when the party reached the spot but the other two were apprehended. They

were all convicted and sentenced by the trial Court to six months'' rigorous imprisonment and a fine of Rs. 200/-, in default to undergo further

rigorous imprisonment for three months. The learned Sessions Judge on appeal acquitted Passa but confirmed the order of the Magistrate against

the other two. It is obvious that this ease is also not different from the first one when considered from the point of view of the applicability of

Section 165. The counsel has, however, in this case raised one additional argument based on Section 562 Cr. P. C. so far as Bhim Singh is

concerned. I will deal with this contention after disposing of the challenge to the trial on the basis of violation of Section 165.

10. Reverting to the attack based -on the alleged non-compliance with Section 165, as I look at the position, this provision has been enacted I for

being used in cases in which search warrants, can in the ordinary course be made use of but on account of lack of time it is considered impolitic to

resort to the somewhat lengthy process of securing search warrants. I am, therefore, disposed as at present advised to take the view that where

information about a person working a still is received and the police officer with a raiding party proceeds to the alleged place of working the still to

see if it is so the provisions of Section 165 are not attracted. Considered from this point of view there is no question of searching any place for

anything necessary for the purpose of investigating into an offence.

11. But even if Section 165 were to be considered applicable I am definitely of the view that every deviation from the details of procedure

prescribed in this section does not necessarily vitiate the raid or nullify the recovery of the articles. The Supreme Court decision in The State of

Rajasthan Vs. Rehman, as I read it, does not support the Petitioner''s contention that noncompliance with the provisions of section- 165 vitiates or

nullifies the search. It is one thing to say that the violation of Sections 103 and 165 of the Code may render the search illegal but is quite another

thing to urge that the seizure of the articles as a result of such a search becomes illegal and, therefore, liable to be ignored. Contravention of these

provisions would only enjoin the Courts dealing with the case to examine the matter more closely and also to see if the accused has been

prejudiced as a result of deviation from the prescribed procedure.

12. This question was raised before Shamsher Bahadur J. In Gulzar Singh v. State (1962)64 P. L. R. 403 and AIR 1946 456 (Lahore) was cited

apparently in support of the nullity argument. The learned Single Judge, however, following In T. Subramania Achari A. I. R. 1964 mad. 129, held

the defect to be curable u/s 537 of the Code. A reference in the judgment was also made to a Full Bench decision of this Court in Krishen Kumar

Vs. The State, Had the matter rested there I would perhaps have felt inclined in view of the unequivocal observations in AIR 1946 456 (Lahore)

to refer the matter to a larger Bench but luckily a Bench of three Judges of the Supreme Court has recently in Radhakishan Vs. State of U.P.,

settled the matter laying down that seizure of articles in pursuance of a search in contravention of Sections 103 and 165 is not vitiated. Thus spoke

the Court: -

So far as the alleged illegality of the search is concerned it is sufficient to say that even assuming that the search was illegal the seizure of the articles

is not vitiated. It may be that where the provisions of Sections 103 and 165, Code of Criminal Procedure, are contravened the search could be

resisted by the person whose premises are sought to be searched. It may also be that because of the illegality of the search the Court may be

inclined to examine carefully the evidence regarding the seizure. But beyond these two consequences no further consequence ensues. The High

Court has chosen to accept the evidence of the prosecution with regard to the fact of seizure and that being a question to be decided only by the

Court of fact, this Court would not re-examine the evidence for satisfying itself as to the correctness or otherwise of the conclusions reached by the

High Court.

13. If the Lahore decisions lay down anything to the contrary then they can no longer hold the field and can by no means constitute a binding

precedent for this Court. No other point having been urged, this is enough to dispose of Cr. R. No. 68 of 1963 which is hereby dismissed.

14. In Cr. R. No. 88 of 1963 it may be observed that production of an article in pursuance of a statement u/s 27, Evidence Act, can hardly be

considered on the plain language of Section 165 of the Code to attract its provisions. To me it appears to be extremely doubtful if Section 165

applies to such a case and the industry and the research of the Bar has not boon able to find any precedent in support of its applicability. This is an

additional reason in Cr. R. No. 88 of 1963 entailing its dismissal.

15. In Cr. R. No. 303 of 1963 the further argument advanced by the Petitioner based on Section 562 of the Code is that Bhim Singh, accused is

only 15 years old and that being his first offence he should be dealt with under this section. My attention has in this connection been drawn to Lekh

Raj etc. v. The State (1960) 62 P. L. R. 156, where I observed that this section applies to crimes committed out of mere thoughtlessness,

inadvertence or under the influence of others or by those who have been led astray for the first time by the force of circumstances and not to well-

planned commission of offences. The learned Counsel has very fairly brought to my notice the fact that the applicability of Section 562 to cases like

the present has been referred to a larger Bench by Bedi J. in Cr. R. 754 of 1962, though in two cases this section has been applied to cases under

the Excise Act: See Cr. Revisions No. 182 of 1958 and Cr. Revision No. 368 of 1962. A suggestion has, accordingly, been thrown that I may

await the decision of the larger Bench.

16. Had I considered the present case to be a fit one for action u/s 562 I would certainly have awaited the decision of the larger Bench but I have

not been able to persuade myself that on the existing material a case for action under this section is made out. Release under this section on

probation of good conduct can be ordered if it appears to the Court before which an offender is convicted that regard being had to his age,

character or antecedents and to the circumstances in which he committed the offence it is expedient to take action under it. In the case in hand

except for the bare oral prayer at the bar that action may be taken under this section against Bhim Singh the counsel has not drawn my attention to

any material on the record from which the essential pre-requisites for such action could be founded upon. It is pertinent to point out that no such

plea was put forward in either of the two Courts below with the result that I have not had the benefit of their opinion on this aspect. As a matter of

fact neither in the defence of Bhim Singh nor in the grounds of appeal in the Court of the Sessions Judge nor even in the grounds of revision in this

Court is this precise plea to be found. It is only during the arguments that the learned Counsel claimed for this accused action u/s 562 on the basis

only of his age, but without pointing out any thing from the record as to whether his character and antecedents, the social status of his parents or

the circumstances in which the offence was committed warranted or justified such action. The defence put forth by Bhim Singh nowhere suggested

that he had been led astray by his companions and that he was not conscious of what he was doing ; nor is there any expression of regret for what

he had done. In this background I do not find it easy to be able to give Bhim Singh benefit of Section 562.

17. For the reasons just stated this revision also must fail and is hereby dismissed.