
(2007) 05 MP CK 0024
Madhya Pradesh High Court
Case No: None

Pappu		APPELLANT
	Vs	
State of Madhya Pradesh		RESPONDENT

Date of Decision: May 9, 2007

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 374
- Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) - Section 20, 41, 42, 43, 50

Citation: (2007) 3 MPHT 40

Hon'ble Judges: K.S. Chauhan, J

Bench: Single Bench

Final Decision: Allowed

Judgement

K.S. Chauhan, J.

This appeal has been preferred being aggrieved by the judgment, finding and sentence dated 4-3-1993 passed by the Special Judge, Sagar in Special Case No. 2/92 whereby the accused/appellant has been convicted u/s 8(c)/20(b)(i) of Narcotic Drugs & Psychotropic Substances Act, 1985 (in short "the Act") and sentenced R.I. for one year and fine of Rs. 2,000/- in default of payment of fine to undergo further R.I. for one year.

2. The prosecution case in brief is that on 27-1-1992 at 22:30 p.m. R.P. Rawat, Sub Inspector of Kotwali, Sagar during the course of his patrolling in the city received an information that Pappu Raikwar is selling ganja near Paras Talkies. On this information he went there alongwith Constable Nos. 279, 1289, 152 and laid raid in the presence of witnesses Manikant Bilaiya and Satish Kumar Soni who were available on the spot and seized 8pudiya (small packets), Rs. 56/- the amount of sale price of ganja from the pocket of the pant and 13 pudiya (small packets) ganja from his Bajaj Priya Scooter. Thus total 65 grams ganja was seized. The accused was

arrested. The FIR was recorded wherein the Crime No. 57/92 u/s 8/20, NDPS Act was registered against the accused. The seized articles were sent for chemical analysis of FSL, Sagar. The report from FSL, Sagar confirmed the seized articles to be ganja. After completing the investigation charge-sheet was filed.

3. The accused was charged u/s 8(c) read with Section 20(b)(i) of the Act alleging that on 27-1-92 he was found in possession of 65 grams ganja without any valid licence.

4. The accused abjured the guilt and claimed to be tried.

5. The prosecution examined as many as four witnesses. Accused did not adduce any defence evidence.

6. After concluding the trial the Special Judge found case of the prosecution proved and convicted and sentenced the appellant as stated earlier.

7. Being aggrieved by the judgment of the Trial Court the instant appeal has been filed u/s 374(2) of the Code of Criminal Procedure on the grounds mentioned therein.

8. The learned Counsel for the appellant submitted that the prosecution has failed to prove the case beyond reasonable doubt. The entire case is based on the solitary testimony of R.P. Rawat, Inquiry Officer. The prosecution has also not complied with the provisions of Sections 41,42,43 and 50 of the Act. The seized articles were not kept in sealed cover. Without following the procedure of sealing the articles it cannot be said that the same kind of articles were sent for chemical examination. According to the prosecution 21 small packets were alleged to have been seized from the possession of the appellant but only two were sent for analysis, therefore, the sample sent for chemical analysis was not a representative sample. The grounds of arrest were also not informed to him and Section 52 also not complied with. Tampering with the seized articles after seizure and before sending the sample for analysis in laboratory cannot be ruled out. The confiscation of seized scooter is completely illegal. The Trial Court failed to appreciate the evidence on record in its proper perspective which resulted into great miscarriage of justice to the appellant and the imposed sentence is also severe and uncalled for.

9. On the other hand, Shri Sudesh Verma, learned G.A. appearing on behalf of the respondent-State has submitted that the Sub-sections (5) and (6) of Section 50 has been added vide amendment dated 2-10-2001, therefore, there was no obligation on the part of Investigating Officer to send information to the superior of the police. It is also submitted that the appellant should himself require to be taken to the nearest Gazetted Officer or to the nearest Magistrate at the time of making the arrest. It is further submitted that no question has been put up in cross-examination to the I.O. regarding the contravention of the provisions of Section 50, therefore, the appellant has rightly been convicted and sentenced by the Trial Court hence it does not call for any interference.

10. The main point for consideration in this appeal is that whether the Trial Court has committed any illegality in convicting and sentencing the appellant u/s 8(c) read with Section 20(b)(i) of the Act ?

11. Shri R.P. Rawat (P.W. 4) received the information regarding selling of ganja by the appellant when he was on patrolling duty in Sagar city. He alongwith the police staff went there and seized 8 small packets of ganja from his pocket of pant, Rs. 56/- sale price of ganja and 13 small packets of ganja from the scooter. Thus, total 65 grams ganja was seized from him vide Exh. P-2, seizure memo.

12. It is borne out from this evidence that the search and seizure was made in presence of the two witnesses namely Manikant Bilaiya and Satish Kumar Soni who were available at the spot. The appellant was arrested vide Exh. P-3 arrest memo.

13. The prosecution has examined both witnesses Manikant Bilaiya (P.W. 2) and Satish Kumar Soni (P.W. 3). They have not supported the prosecution story and declared hostile. Although they admitted the signature on seizure memo (Exh. P-2) and arrest memo (Exh. P-3). But they have not deposed that the ganja was seized from the possession of the accused. The statement of R.P. Rawat is not supported by the statement of independent witnesses.

14. According to the prosecution 8 small packets of ganja were seized from the pant pocket and 13 packets from the dikki of Bajaj Priya Scooter held by the appellant as well as from his vehicle. In such circumstances, the provisions of Section 50 of the Act ought to have been complied with.

15. The learned Counsel for the appellant expressed that there is non-compliance of provisions of Section 50 of the Act. He has placed reliance on the judgment rendered by Hon"ble Apex Court in the case of [State of Punjab Vs. Balbir Singh](#) , wherein it has been held that:

It is an imperative requirement on the part of the officer intending to search to inform the person to be searched of his right that if he so chooses, he will be searched in the presence of a Gazetted Officer or a Magistrate. Thus the provisions of Section 50 are mandatory.

He has also placed reliance on the judgment rendered in the case of [Ali Mustaffa Abdul Rahman Moosa Vs. State of Kerala](#) , wherein it has been held that:

Where a Police Officer on receiving information that a person is in possession of contraband (charas), wants to subject him to search, it is the duty of the Police Officer to give option to the person as to whether he desired to be searched in the presence of a Gazetted Officer or a Magistrate as envisaged by Section 50. The failure to provide that option to the accused vitiates his conviction. The provisions of Section 50 are mandatory, the non-compliance whereof vitiates the conviction. It is not necessary that the person who is about to be searched should by himself make a request.

He has also placed reliance on the judgment rendered by this Court in the case of Anil Kumar Gupta v. State of M.R. 1999(1) J.L.J. 396, wherein it is held that:

Section 50 is the mandatory provision has not been complied with in terms and spirit.

He has further placed reliance in the case of State of M.P. v. Nathu Lal and Anr. 2002(11) MP 480, wherein it is held that:

compliance of Section 50 is necessary at the time of seizure.

16. Section 50 of N.D.P.S. Act runs as follows:

(1) When any officer duly authorized u/s 42 is about to search any person under the provisions of Section 41, Section 42 or Section 43, he shall, if such person so requires, take such person without unnecessary delay to the nearest Gazetted Officer of any of the departments mentioned in Section 42 or to the nearest Magistrate.

(2) If such requisition is made, the officer may detain the person until he can bring him before the Gazetted Officer or the Magistrate referred to in Sub-section (1).

(3) The Gazetted Officer or the Magistrate before whom any such person is brought shall, if he sees no reasonable ground for search, forthwith discharge the person but otherwise shall direct that search be made.

(4) ...

17. On the perusal of the provision of Section 50 and in the light of the pronouncement made by this Court and Hon"ble Apex Court the compliance of Section 50 of the Act is mandatory.

18. The argument on behalf of the State is put forth that no question was put to I.O. regarding non-compliance of this section but the argument is not acceptable due to the fact that I.O. has nowhere deposed that he made the compliance of Section 50, therefore, there was no occasion to cross-examine this witness on this point. The question can be raised at any stage if there is the violation of any mandatory provision. The plea of non-compliance of Section 50 cannot be rejected merely on technical plea that such objection was not taken in the Court of first instance. See Saiyed Mohd Saiyed Umar Saiyad v. State of Gujarat 1995 Cri. L.J. 2662.

19. So far as this case is concerned, the 8 small packets of ganja were seized from the pant pocket of the appellant. The seizure was from his person, therefore, the compliance of Section 50 of the Act was necessary failing which the entire trial is vitiated.

20. On perusal of record it is found that the I.O. has left several other discrepancies in this case. He has not made any search panchnama of himself and the witnesses. No weightment panchnama was prepared. Panchnama regarding taking sample and

sealing was not prepared. The arrest memo does not disclose that the appellant was apprised of the grounds of his arrest as required u/s 52(1). The report regarding the compliance of Section 57 of the Act is not made to his immediate superior officer.

21. No doubt the FSL report (Exh. P-6) indicates that the seized article was found ganja but this alone is not sufficient because the search and seizure is not legal in such situation it cannot be said that the accused was having 65 grams of ganja. The sample was not sealed at the spot, therefore, the possibility of tampering with it cannot be ruled out.

22. The Trial Court has totally failed to consider the different mandatory aspects regarding the procedure to be followed in such cases, hence, committed illegality in convicting and sentencing the appellant u/s 8(c) read with Section 20(b)(i) of the Act. Such findings are hereby set aside and it is held that the prosecution has failed to prove the case beyond reasonable doubt against the appellant, therefore, he deserves to be acquitted.

23. Consequently, the appeal succeeds and is allowed. The impugned judgment of the Trial Court is set aside. The accused is acquitted from the charge u/s 8(c) read with Section 20(b)(i) of the Act. He is on bail. His bail bonds are discharged. The fine amount if paid be refunded to the appellant.

24. The seized scooter be returned to its registered owner. The seized amount Rs. 56/- be returned to the appellant. The order regarding the disposal of other criminal properties of the Trial Court is affirmed.