

Mansaram Vs State of M.P.

Court: Madhya Pradesh High Court

Date of Decision: April 16, 1993

Acts Referred: Criminal Procedure Code, 1973 (CrPC) â€” Section 100(4), 151, 374(2)
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) â€” Section 20, 41, 42, 43, 44

Citation: (1994) JLJ 152

Hon'ble Judges: Faizanuddin, J

Bench: Single Bench

Advocate: S.C. Datt, for the Appellant; Dilip Naik and D.A.G., for the Respondent

Final Decision: Allowed

Judgement

Faizan Uddin, J.

In this Criminal Appeal filed u/s 374(2) of the Code of Criminal Procedure, the Appellant has challenged his conviction

u/s 20(b)(ii) read with Section 8(c) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as as "Act") for which

he has been sentenced to undergo rigorous imprisonment for 10 years and fine of Rs. 1 lakh, in default of payment of fine to undergo further

rigorous imprisonment for two years, by the VIII th Additional Judge to the Court of Sessions Judge, Bhopal, in Sessions Trial No. 53 of 1991,

decided on 29.4.1991.

2. The facts giving rise to the filing of the present appeal are that when A.S.I. Laxman Singh Chouhan (P.W. 1) who at the relevant time was

posted in Police Station Talaiya, Bhopal, received an intimation on 19.7.1989 that the Appellant was indulging in the sale of illicit liquor he,

therefore, proceeded to Budhwara locality within the jurisdiction of his police Station. At Budhwara, S.I. Vipin Tiwari and S.K. Verma met him

and all proceeded to Itwara locality. At Itwara, Laxman Singh Chouhan took S.I. Ashok Tiwari with him and raided to house of the Appellant

Mansharam at about 7.10 p.m. on 19.7.1989 and arrested the Appellant u/s 151 of the Code of Criminal Procedure. A.S.I. Laxman Singh

Chouhan (PW 1) also seized liquor from the residence of Appellant. After his arrest and seizure of liquor, A.S.I. - Laxman Singh took a personal

search of the Appellant and from the pocket of his Pant he recovered seven Pudias of charas wrapped in a handkerchief. The said charas was

seized by him as per seizure memo (Ex. P/1) under his signature and the signatures of the witnesses. ASI-Laxman Singh took the Appellant to the

Police Station Talaiya where he recorded First Information Report (Ex. P/2) of the occurrence. The seized charas was sent for examination to the

Chemical Examiner, Sagar, who, as per his report (Ex. P/5), found positive results.

3. The Appellant was charged and tried for commission of an offence u/s 20(b)(ii) read with Section 8(c) of the Act. The Appellant abjured his

guilt, denied the alleged seizure of Charas from him and pleaded to be tried contending that he was falsely implicated. The learned trial Judge

accepted the prosecution evidence regarding seizure of charas on personal search of the Appellant which amounts to an offence under the Act and,

therefore, convicted and sentenced him as said above against which this appeal has been preferred.

4. Learned Counsel appearing for the Appellant made a scathing attack on the findings recorded by the learned trial Judge by contending that the

Narcotic Drugs and Psychotropic Substances Act, 1985, provides a special procedure in regard to the search, seizure and production of an

accused and seized articles etc. different from the one as contained in the Code of Criminal Procedure, 1973, but the prosecution violated the

mandatory procedure contained in Sections 42, 50, 52, 53 and 57 of the Act in prosecuting the Appellant and the learned trial Judge also failed to

take note of the same which resulted into miscarriage of justice and, therefore, the conviction of the Appellant cannot be sustained.

5. Earlier the statutory control over narcotic drugs was sought to be achieved through various Central and State enactments through medium of

Opium Act, 1857 and 1878 as well as the Dangerous Drugs Act, 1910 etc. which with the passage of time and the developments in the field of

illicit drug traffic and drug abuses at national and international level proved to be ineffectual necessitating a comprehensive legislation sufficiently

stringent in nature to combat the challenges of the day posed by the drug traffickers and smugglers. It is common knowledge that the whole country

seems under the spell of variety of narcotic drugs and psychotropic substances a situation created by traffickers who could not be properly dealt

with under the existing laws. Due to fact increase of consumption of drugs, the country was becoming one of the centers of Narcotics underworld

criminally and in order to curb all these undesirable activities of drug traffickers, the Parliament enacted the present Act of 1985. It cannot be

disputed that it is one of the primary duties of the Government under the Constitution of India to take steps and measures, check health hazards

and improve public health inter-alia by prohibiting the consumption of intoxicating drinks and drugs which are injurious to health. No doubt, the

Narcotic Drugs and Psychotropic Substances Act, 1985, is a special law made by the Parliament to meet the above requirements with stringent

provision of control and regulation of the operation relating to Narcotic Drugs and Psychotropic Substances providing deterring punishment

including the forfeiture of property driven from or used in illicit traffic of such drugs and substances. But, at the same time, fool-proof procedure

has been laid down to eliminate any scope and chances of adopting any unfair means or methods by the investigating agency in the conduct of

investigation and to avoid suspicion and doubt about the authenticity of the seizure of any Narcotic Drugs and Psychotropic Substances, amounting

to an offence under the Act.

6. Chapter-V of the Act contained the complete procedure for issuance of warrant, search seizure and investigation of the crime under the Act. It

consists sections 41 - 68; but for our purposes section 42, 50, 52, 55 and 57 alone are relevant. Section 41 deals with power to issue warrant and

authorisation. Section 42 relates to power of entry, search-seizure and arrest without warrant or authorisation. It provides that any officer

mentioned in the section has reasons to believe from personal knowledge or information given to him by any person and taken down in writing, that

any offence of narcotic drug or psychotropic substance punishable under Chapter IV of the Act, has been committed, he may between sunrise and

sunset--enter into and search any building, conveyance or place and after removing the resistance, if any, seize such substance and materials used

in the manufacture thereof and if necessary, arrest any person whom he has reason to believe to have committed the offence. Section 50 lays down

conditions under which search of persons shall be conducted. It provides that when any officer who is duly authorised u/s 42, is about to search

any person under Sections 41, 42 or 43, he shall, if such person so requires, take such person without unnecessary delay to the nearest Gazetted

Officer of the departments mentioned in Section 42 or to the nearest Magistrate and 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.

Further Section 52 relates to disposal of persons arrested and articles seized. It directs that every person arrested and article seized u/s 41(1) shall

be forwarded without unnecessary delay to the Magistrate by whom warrant was issued and every person arrested and article seized shall be

forwarded without unnecessary delay to--(a) the officer incharge of the nearest police station, or (b) the officer empowered u/s 53. Section 55

enjoins a duty on the officer incharge of a police station to take charge of and keep in safe custody pending the orders of the Magistrate, all articles

seized under this Act. It also provides for taking the sample of the articles seized. Section 57 provides that whenever any person makes any arrest

or seizure under this Act, he shall, within forty-eight hours next after such arrest or seizure make a full report of the particulars of such arrest or

seizure to his immediate official superior. A reading of these provisions clearly go to show that the legislature has prescribed elaborate procedure

with sufficient safeguards to a person accused of an offence under the Act and unless the procedure is strictly adhered to by all the concerned

officers and the investigating agency the prosecution will ultimately as in the present case, would result into failures.

7. Now adverting to point in controversy in the instant case, learned Counsel appearing for the Appellant first contended that ASI Laxman Singh

Chouhan (P.W 1), who set out for search of the Appellant had not taken down in writing the knowledge and information that he had received in

connection with the Appellant and the reasons to believe such knowledge or information before proceeding for search of the Appellant. It was,

therefore, contended that there was a clear breach of the mandate of Section 42. In this connection, it may be pointed out that ASI-Laxman (PW

1) has not deposed that he had any knowledge or information against the Appellant with regard to any narcotic drugs or psychotropic substances

which necessitated him to take down the same in writing as required by Section 42. All that he stated is that he had only received information that

the Appellant was selling illicit liquor. From this statement and the facts on record, it clearly turns out that ASI Laxman Singh, who effected the

personal search of the Appellant, was completely ignorant of the possession of any narcotic drugs or psychotropic substances by the Appellant. If,

it was known to Laxman that the Appellant is possessed of charas, then certainly he was under an obligation to record and take down the fact in

writing before search and seizure as required by Section 42 of the Act. But in the instant case, the fact of possession of narcotic substance that is

charas by the Appellant, came to be known to police officer Laxman (PW 1) only after the search and seizure of charas from the Appellant. In

these facts and circumstances, it could not be expected from the Police Officer to record or take down the fact in writing which is totally not

known to him. The factum of violation of procedure about taking down in writing by itself cannot by any stretch of imagination be regarded to be

causing any kind of material prejudice to the case of the Appellant vitiating the entire prosecution. In such a situation, what is necessary to be

examined is whether the search and seizure were true and evidence adduced by the prosecution inspires confidence so as to be accepted by the

Court which shall be examined at a later stage.

8. Learned Counsel for the Appellant then urged that the police officer also failed to observe the mandatory provision of Section 50 inasmuch as

the Appellant was not apprised of his right u/s 50 to exercise his choice of being searched in the presence of a gazetted officer of the departments

mentioned in Section 42 or the nearest Magistrate. In the considered opinion of this Court, the question of compliance of Section 50 under the

peculiar facts and circumstances of the present case was also not possible for the reasons already mentioned above. At the risk of the repetition, it

may be stated that since the house of the Appellant was raided on the information that he is dealing illicit liquor and during the course of such raid

when personal search was made, charas was suddenly recovered from which the police officer had neither any prior personal knowledge or any

information from any other source. But in fact the police officer was completely oblivious of the factum of possession of any narcotic drug or

psychotropic substance by the Appellant. Once the search was made and charas was recovered from his person, it was meaningless to take the

Appellant either to the nearest gazetted officer of the departments mentioned in Section 42 or to any nearest Magistrate to affect the search or

seizure which was already done and charas was already recovered and seized.

9. Learned Counsel for the Appellant next submitted that after his arrest, the Police Officer A.S.I. Singh Chouhan (PW 1) neither informed the

Appellant of the grounds for such arrest nor the seized article charas was forwarded without unnecessary delay to the officer incharge of the

nearest police station in accordance with the mandatory provisions contained in Section 52 of the Act. As regards the allegation of non-production

before the officer incharge of the nearest police station, there is evidence as contained in para 18 of the deposition of ASI-Laxman (PW 1) that he

did produce the Appellant before the T.I. of the Police Station after his arrest. But as regards the allegation that the police officer did not inform the

Appellant of the grounds of such arrest and that the article seized was not forwarded to the officer incharge of the nearest police station or the

officer empowered u/s 53, there appears to be much substance. The entire reading of the evidence of Laxman Singh (PW 1) goes to show that he

did not depose that after the arrest of the Appellant he had informed him of the ground for such arrest or he had forwarded the charas seized from

the Appellant to the officer incharge of the nearest police station or the officer empowered u/s 53 of the Act. There is no evidence at all on this

aspects. Here a reference to provision of Section 55 of the Act may also be made which contemplates that an officer incharge of the police station

shall take charge of and keep in safe custody, pending the orders of the Magistrate, all articles seized under this Act and which may be delivered to

him. This provision is a mandatory provision and there is no evidence that it was complied with. ASI Laxman Singh (PW 1) has made no statement

that the seized article was given to the officer incharge of the police station. See Chhoteylal v. State of Rajasthan 1989 EFR 354, Para 6, wherein

it has been observed that this contravention will certainly prejudice the accused as Section 52 provides safeguards to the accused and the said

provisions have been purposely made by the Parliament in order to save the accused from unnecessary harassment.

10. Further Sub-section (4) of Section 52 of the Act relates to the disposal of such properties and provides that the authority or officer to whom

any person or article is forwarded shall, with all convenient despatch, take such measures as may be necessary for the disposal according to law of

such person or article. These directions in Section 52 are mandatory providing safeguards to the accused because the intention of the Parliament

by embodying these conditions in Section 52 was to ensure just and fair investigation by responsible officers, to avoid and eliminate grievances

against the officers of the ranks lower than incharge of a police station to have abused their powers. But these mandatory provisions have been

entirely ignored by reason of which a doubt in the investigation process is created, the benefit of which must go to the Appellant.

11. Learned Counsel then assailed the evidence regarding seizure of alleged charas from the Appellant. He submitted that the two witnesses of the

search and seizure, who were examined by the prosecution, have turned hostile. Apart from their being hostile the said witnesses were the selected

witnesses and not the witnesses of the same locality as required by Sub-section (4) of Section 100 of the Code of Criminal Procedure. He assailed

the evidence of ASI-Laxman Singh (PW 1) and the police constable Govind Singh (PW 4) as interested witnesses unworthy of any reliance. In this

connection, it may be pointed out that ASI-Laxman (PW 1) has deposed in para 13 that he had taken the witnesses with him who met him on

Budhwara-It-wara road. He also deposed that he had called the witnesses of the vicinity for search and seizure but they all declined to oblige him.

This evidence goes to show that association of independent witnesses of the locality was not possible in the present case. But it may be pointed out

that the mere fact that the witnesses who are not residents of the locality, are taken by a raiding party to witnesses the raid, is not sufficient to vitiate

the proceedings. So also, even if, no independent witnesses but only police officers are examined to prove the case that will not by itself be

regarded as a fatal infirmity as there is no rule or any presumption that the police witnesses are not the truthful witnesses. The non-compliance of

the provisions of Sub-section (4) of Section 100 of the Code of Criminal Procedure may be an irregularity but in a case where proceeding of

search and seizure appeared to be faulty and doubtful, the evidence of witnesses of seizure will have to be closely scrutinised. That being so, unless

it is demonstrated that the police witnesses are not truthful, their evidence cannot be discarded. But, what is necessary is that the evidence of Police

witnesses, who are interested required close and cautious scrutiny and careful examination before accepting the same. I shall, therefore, make a

close scrutiny of the evidence of the witnesses of search and seizure namely, ASI-Laxman Singh Chouhan (PW 1) and constable Govind Singh

(PW 4).

12. ASI-Laxman Singh (PW 1) deposed that he had sealed seven pudias of charas then and there on the spot after the same were searched and

seized from the Appellant; but Govind Singh (PW 4) makes no statement in this behalf; on the contrary, he made a vague statement in para 13 of

his deposition that he took charas from the accused and kept them with him but he did not see those pudias on reaching the police station. He

further deposed in para 13 of his deposition that he had taken the witnesses with him, who met him on Budhwara-Itwara road; but quite contrary

to this, constable Govind Singh (PW 4) deposed in para 6 that both these witnesses were taken by them from the Police Station itself. A perusal of

statement in para 10 of witness Govind Singh goes to show that both the witnesses of seizure were taken in a police van. Munna (PW 3) one of

witnesses of the seizure even went to the extent of stating that he was living behind Talaiya Police Station where ASI-Laxman Singh (PW 1) is

posted and that ASI-Laxman was in the habit of forcing this witness frequently to sign on various papers at different occasions. He also deposed

that Laxman Singh had taken his signature on blank paper in the instant case. Most significant and inconsistent statement is contained in para 15 of

the deposition of ASI-Laxman Singh (PW 1) where he states that he had left the police station at 11 a.m. and reached the spot where search and

seizure were effected after 7p.m. But quite contrary to this, Constable-Govind (PW 2) who is said to be accompanying Laxman Singh, deposed in

para 11 of his deposition that they had left the police station at about 7 p.m. There are some other inconsistencies also in the statement of Laxman

Singh (PW 1) and Govind Singh (PW 4). A combined reading of these contradictions and inconsistencies in the evidence of these two police

witnesses, an impression is gathered that they are not wholly truthful witnesses and their evidence with regard to the search and seizure of charas

does not inspire confidence. It does not, therefore, appear advisable to accept their interested evidence without corroboration from any independent

source, as they are not found to be wholly truthful.

13. Learned Counsel for the Appellant lastly contended that there was also non-compliance of mandatory provision contained in Section 57 of the

Act inasmuch as after the arrest and seizure, a full report of particulars of such arrest and seizure was not made by ASI-Laxman Singh, to the

immediate official superior within forty-eight hours next after such arrest and seizure. There is much force in this submission also as there is no

evidence at all to show that a full report of particulars of the arrest and seizure was made by ASI-Laxman Singh (PW 1) to his immediate official

superior, so as to show that the investigation was fair. This is one of the checks provided by the Legislature in order to secure fair investigation and

to eliminate any chance of any grievance or complaint by an accused person. The obvious object behind this provision is that the prosecution is left

with no opportunity of improving upon the earlier and first version of all particulars of the occurrence. In Smt. Zubada Khatoon v. Assistant

Collector 1991 (1) EFR 617 Para 13, a Division Bench of Karnataka High Court took the view that the provisions contained in Section 57 are

mandatory in character and the failure to comply with the mandatory provisions of Section 57 will certainly result in the prejudice to the accused

Appellant. Similar view has been expressed by a Division Bench of High Court of Himachal Pradesh in Ramkishan v. State of H.P. 1992 (1) EFR

395, Para 7. Further in Mahaboob Bee v. State of Madras 1992 (2) EFR 4, the Madras High Court also took the view that the provision of

Section 57 are mandatory and if the provisions are not complied with the conviction is vitiated. Similar view was expressed by Rajas- than High

Court in Bhanwar Singh v. State of Rajasthan 1990 (1) EFR 300.

14. Before parting with this appeal, I feel it necessary to point out that Sections 41 - 57 of the Act, lay down an elaborate procedure with regard

to issuance of a warrant, search, seizure and production of articles seized and a person accused of an offence under the provisions of the Act; but

the officers authorised in this behalf and the investigating agency do not seem to be conversant with the relevant provisions of the law and the

intricacies involved there by reason of which, most of the trials result into a futile exercise. The ultimate result is that the purpose of this new

enactment also does not seem to achieve its objective. Better results could not be expected in the present state of affairs where the official

concerned and the investigating agency seem to be totally ignorant of the mandatory procedure and provisions made under the Act as safeguards,

the non-compliance of which vitiates the trial. In these circumstances, the Government would be better advised to issue guidelines highlighting the

relevant and mandatory provisions the compliance of which is necessary under the Act and also to organise training programmes to impart

necessary knowledge and information to the official concerned and the investigating agency.

15. For the reasons stated above, the appeal succeeds and is hereby allowed. The judgment dated 29.4.1991 passed by the VIII th Additional

Sessions Judge, Bhopal, in Sessions Trial No. 53 of 1991 convicting and sentencing the Appellant as said above, is set aside and the Appellant is

acquitted of the offences charged with. The Appellant be released forthwith, if not required in any other offence.