

(2007) 07 PAT CK 0151
In the Patna High Court

Afroz Mian, Md. Ansarul and Md. Kabir	APPELLANT
Vs	
The State of Bihar	RESPONDENT

Date of Decision : 23-07-2007

Acts Referred:

Citation : (2007) 07 PAT CK 0151

Final Decision : Allowed

Judgement

Chandra Mohan Prasad, J.—This appeal is against the -judgment dated 18.9.2004/21.9.2004 of the 5th Additional Sessions Judge. West Champaran. Betia (Gopalpur P.S. Case No. 37/99) C.R. No. 1785/99 whereby each of the three appellants has been convicted u/s 20(ii) of the N.D.P.S. Act. 1985 and sentenced to R.I. for ten years and a fine of Rs. 1 lakh and in default of payment of fine to undergo R.I. for two years.

2. The prosecution was initiated on the written report of the informant Nand Kishore Prasad Singh (P.W. 1), the officer-in-charge of the Gopalpur P.S. station in his written report that that day (1.9.99) at about 8:30 P.M. he, alone with armed police personnel comprising of Home Guards, Surendra Prasad (P.W. 5), Bindeshwari Prasad (P.W. 6), Umesh Prasad (P.W. 4), Arbind Kumar Pandey (P.W. 7) and others was engaged in maintenance of law and order and checking duty in course of polling for Lok Sabha Election and that in course of that he (informant) found three persons (appellants 1 boarded on a tractor were coming from Balthara side. The tractor was stopped and these three persons boarded on the tractor were interrogated and they disclosed their name as Afroz Alain. Md. Kabir and Md. Ansarul. the appellants. The informant further alleged that on search half kg of charas. contained in plastic packet was recovered from left inner pocket of shirt of the appellant Afroz Alam. One kg of charas contained in two pockets, half kg each was recovered from the shirt of the appellant Md. Kabir. And half kg of charas contained in plastic packet was recovered from the shirt of the appellant Md. Ansarul. On interrogation the appellants disclosed that they had purchased the charas from one Kishori Sao. The recovered charas was

seized and a seizure list was prepared (Ext. 1) in presence of tractor "driver" Rudal Singh (P.W. 2) and "Khalashi" Dukhi Paswan (P.W. 3) who signed on the seizure list. A copy of seizure list was also handed over to the appellants. On the basis of written report (Ext. 3) F.I.R. (Ext. 4) was lodged. After lodging of the F.I.R. investigation commenced and on completion of investigation chargesheet was submitted. During investigation, the report (Ext. 5) of FSL was received which reported that the sample of the seized material was found to be charas on examination. After submission of chargesheet, the appellants were put on trial and they have been convicted and sentenced as above.

3. As raanv as seven witnesses were examined by prosecution.

4. P.W. 1 Nand Kishore Prasad Singh is the informant himself.

5. P.W.2 Rudal Sinah and P.W. 3 Dukhi Paswan tractor driver and the khalashi have turned hostile to prosecution and they have not supported the factum of recovery from the possession of the appellants.

6. P.W.4. Umesh Prasad. Home Guard, was a member of the police party but he too has turned hostile. This witness says that he was in the police party but any recovery was not made in his presence. On his attention being drawn towards his previous police statment. this witness denied to have given any police statement supporting the case of prosecution before the 1.O. This has to be mentioned here that prosecution has not examined the 1.O. and thus any statment of witness as made before the police was not proved on record.

7. P.W. 5 Surendra Prasad, was also a Home Guard and also a member of the police party. This witness says that he had signed on the seizure list but he further continued to depose that when he had put his signature the paper was blank.

8. P.W. 6 Bindeshwari Prasad, was also a home guard who was said to be a member of the police party. He states in his evidence that he was a member of the police party but he continued to deposed at para-2 of his evidence that in his presence any seizure of charas had not been made from anyone.

9. P.W. 7 Arbind Kumar Pandev. home guard was also a member of the police party and he deposed that informant had brought down three persons from the tractor and those three persons had disclosed their names as Afroz. Md. Kabir and Md. Ansarul. But this witness has refused to identify these appellants in dock during trial stating that he does not identify them. He deposed that half kg of charas was recovered from Md. Afroz. one kg of charas was recovered from Anraul and half kg of charas was recovered from Md. kabir also. Thus this witness states about recovery of charas from the persons named as Md. Afroz. Md. Anwarul and Md. Kabir. Seeing the appellants in dock, this witness did not identify the appellants as the persons from whom charas was recovered. At para-6 of his evidence this witness further deposed that the persons from whom the charas was recovered were not intimated of their right to claim the search

being made in presence of a Gazetted Officer. He also deposed that the seized charas was not weighed with balance but its weight was mentioned as estimated by the informant.

10. P.W. 1 Nand Kishore Singh is the informant and he is the only witness who has supported the prosecution case. He deposed about recovery of charas from the possession of the appellants. As per the story of prosecution, he also deposed that in presence of tractor driver Rudal Singh (P.W. 2) and khalashi Dukhi Paswan (P.W. 3) the seizure was made and seizure list was also prepared. He admitted at oara-10 of his evidence that he had not weighed the recovered charas with any measuring balance and that the weight was mentioned as per his estimate. He also admitted at oara-13 that he had brought the recovered charas to the P.S. but he had not sealed it.

11. Thus, so far the evidence as adduced by the prosecution is concerned, it is only the evidence of informant which asserts about the recovery of charas from the possession of the appellants. The P.Ws. 4, 5, 6 and 7 who were the members of the police party do not support the recovery from the possession of the appellants. The P.Ws. 2 and 3 who were the driver and khalashi of the tractor and in whose presence the appellants were brought down from the tractor have also not supported the prosecution story about the search and seizure from the possession of the appellants. Besides this, there are several infirmities also in the evidence of the prosecution witnesses in the manner that the informant himself admits that he had brought the seized charas to the P.S., but he had not sealed it. It is also in his evidence that he had not weighed the recovered charas with any weighing scale and he had mentioned the weight as per his estimate.

12. During hearing, the learned Counsel for the appellants pointed out that vide Section 5 of the Act, the officer-in-charge of the police station is bound to take charas of the seized article and is also bound to seal it by putting his seal on the seized article. In the instant case the informant (P.W.11 who was also the officer-in-charge of the P.S. was bound to seal the seized charas after recovery but admittedly he did not seal it. The seized charas is said to have been kept at the P.S. but no iota of the evidence either documentary or oral has been brought before the court to show as to how and in what manner the seized charas was kept or disposed of. The seized article had also not been produced before the trial court. So far the factum of recovery is concerned. I find that only the informant says about the recovery but P.Ws. 4, 5, 6 and 7 who were the members of the police party have not supported the recovery. The P.Ws. 2 and 3 who were the tractor the driver and the khalashi also did not support the recovery from the possession of the appellants.

13. In view of these infirmities, the story of recovery and seizure becomes highly suspect and I do not feel it safe base the conviction on such evidence.

14. During hearing, an important point of law was also raised by the learned Counsel for the appellants. It was argued that Section 50 of the Act enioins that

when a person is to be searched under the Act it is the duty of the searching officer that he will inform the person of his legal rights that he has a right to be searched in presence of a Gazetted Officer or a Magistrate, so that the person may exercise such option. But in the instant case the P.W. 1 who was the searching officer did not fulfil the conditions enjoined in Section 50 of the Act, hence the search and seizure become highly suspect and any conviction cannot be passed on it. Neither in his written report nor in his evidence the informant disclosed anywhere that he had informed the appellants of their legal right to be searched in presence of a Gazetted Officer or a Magistrate rather categorical evidence of the P.W. 7. who was a member of police party, is that the appellants had not been informed of their legal right to be searched in presence of a Gazetted Officer or a Magistrate.

15. In support of his contention, the learned Counsel for the appellants cited the decision of the Apex Court in the case of State of Punjab Vs. Baldev Singh, . The Apex Court has held in the decision that it is an obligation of the empowered officer and his duty before conducting the search of the person of a suspect, on the basis of prior information, to inform the suspect that he has the right to require his search being conducted in the presence of a gazetted officer or a Magistrate. The failure to so inform the suspect of his right would render the search illegal because the suspect would not be able to avail of the protection which is inbuilt in Section 50, Similarly, if the person concerned requires, on being so informed by the empowered officer or otherwise that his search be conducted in the presence of a gazetted officer or a Magistrate, the empowered officer is obliged to do so and failure on his part to do so would cause prejudice to the accused and also render the search illegal and the conviction and sentence of the accused based solely on recovery made during that search bad.

It was further held that the question whether the provisions of Section 50 are mandatory or directory and, if mandatory to what extent and the consequences of non-compliance with it does not strictly speaking arise in the context in which the protection has been incorporated in Section 50 for the benefit of the person intended to be searched, therefore, without expressing any opinion as to whether the provisions of Section 50 are mandatory or not, but bearing in mind the purpose for which the safeguard has been made provisions of Section 50 of the Act implicitly make it imperative and obligatory and cast a duty on the investigating officer (empowered officer) to ensure that search of the person (suspect) concerned is conducted in the manner prescribed by Section 50 by intimating to the person concerned about the existence of his right that if he so requires, he shall be searched before a gazetted officer or a magistrate and in case he so opts, failure to conduct his search before a gazetted officer or a Magistrate would cause prejudice to the accused and render the recovery of the illicit article suspect and vitiate the conviction and sentence of the accused, where the conviction has been recorded only on the basis of the possession of the illicit article, recovered during a search conducted in violation of the provisions of Section 50 of the Act and that the omission may not vitiate the trial

as such, but because of the inherent prejudice which would be caused to an accused by the omission to be informed of the existence of his right it would render his conviction and sentence unsustainable and that the protection provided in the section to an accused to be intimated that he has the right to have his personal search conducted before a gazetted officer or a Magistrate, if he so requires, is sacrosanct and indefeasible it cannot be disregarded by the prosecution except at its own peril.

16. Thus, in view of what has been held by the Apex Court the provisions u/s 50 of the Act are to be necessarily followed and the non-compliance of the provisions go to vitiate the trial causing inherent prejudice to the accused and it would render the conviction and sentence as unsustainable. In the instant case the provision u/s 50 of the Act has not been followed by the authority conducting the search and seizure while making the recovery from the appellants. Therefore, the search and seizure became highly suspect.

17. Thus, considering the evidence and the facts and circumstances as discussed above and also considering the non-compliance of the provision of Section 50 of the Act. I find that prosecution has not been able to prove its case beyond the shadows of doubt and the appellants are entitled to benefit of doubt. In such circumstances, by way of giving benefit of doubt the appellants are acquitted of the charges.

18. In the result, this appeal is allowed.