

(2002) 04 MAD CK 0177
In the Madras High Court
Case No : C.A. No. 847 of 1995

Kader Mohideen

APPELLANT

Vs

State by Inspector of Police, Kodumudi

RESPONDENT

Date of Decision : 10-04-2002

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 374(2)
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 20, 42

Citation : (2002) 04 MAD CK 0177

Hon'ble Judges : Malai Subramanian, J

Bench : Single Bench

Advocate : A.K. Kumaraswamy, for the Appellant; O. Srinath, Government Advocate, for the Respondent

Final Decision : Dismissed

Judgement

Malai Subramanian, J.—This appeal has been directed against the conviction and sentence of the appellant passed by the Special Judge for

N.D.P.S. Court, Coimbatore in C.C.No.111 of 1995 wherein the appellant was sentenced to undergo R.I. for 2 years and to pay a fine of

Rs.10,000/-, in default to suffer R.I. for 3 months for an offence punishable u/s 20(b)(1) of N.D.P.S. Act.

2. On 13.2.1994, P.W.6, the Inspector of Police, Kodumudi on information took P.W.2, Head Constable and other constables to the house

bearing Door No.128, Railway Station Road, Kodumudi which belongs to the appellant. Before proceeding there, he sent prior intimation, Ex.P.5

to the Judicial Magistrate No. II, Kodumudi that he was going to search the house of the appellant. He took P.W.1, Village Administrative Officer

also along with other witnesses to the house of the appellant. After introducing himself to the appellant, P.W.6 made a search of the house and on

the southern side of the room, he noticed M.O.1, gunny bag and when the appellant was questioned as to whether he wanted to have the search

done in the presence of any gazetted officer, the accused replied that the police could make the search and thereafter, he examined the gunny bag

which contained 10 packets of Ganja each weighing 1 Kg. He also weighed the same then and there and took 200 grams of Ganja as sample,

divided them into two, packed them and got the signature of the appellant also. He also got the signature of P.W.1 and Ponnusamy in the search

list. Thereafter, he took the appellant to the Police Station, registered a case in Cr.No.90/94 and then forwarded the accused for remand. He also

gave Ex.P.7, requisition to send the sample for analysis. The Chemical Examination Report has been marked as Ex.P.8. He examined witnesses,

prepared Ex.P.9, sketch of the scene of the occurrence and also observation mahazar. P.W.7, the Inspector, who took up further investigation

verified the investigation done by P.W.6 and then filed the charge sheet against the accused appellant. The case of the appellant is one of denial.

He did not examine any witness on his side.

3. The evidence of P.W.6 that he searched the house of the appellant and found the gunny bag, M.O.1 containing 10 bags of Ganja each weighing

one kilogram has been corroborated by the evidence of P.W.1, Village Administrative Officer of Kodumudi and P.W.2, the Head Constable, who

accompanied P.W.6. The entire Ganja has been marked as M.O.2. P.W.3, the then Tahsildar of Kodumudi gave Ex.P.3, certificate that the house

searched belongs to the appellant. This was not at all disputed. Of course, P.Ws.4 & 5 who were asked to be the witnesses to the search, did not

support the case of the prosecution. Though P.Ws.4 & 5 did not support the case of the prosecution, still there is the evidence of P.Ws.1, 2 & 6

to prove that the house of the appellant was searched and M.Os.1 & 2 were recovered.

4. The only point raised in the appeal by the learned counsel appearing for the appellant is that Section 42 of the N.D.P.S. Act has not been

followed by P.W.6, the Inspector of Police, who conducted the search. According to the learned counsel u/s 42 of N.D.P.S. Act, after the police

officer receives information that any Narcotic Drug or Psychotropic Substance in respect of which an offence has been committed, he should have

taken down the information in writing; but in this case though P.W.6 says that he went only on information, he did not reduce the same in writing

and therefore his act is violative of Section 42 of the N.D.P.S. Act. In support of his contention, he relied on a ruling of the Apex Court rendered

in Abdul Rashid Ibrahim Mansuri Vs. State of Gujarat, In that case, the Inspector of Police got information on 12.1.1988 that one Iqbal Syed

Husen was trying to transport charas upto Shahpur in an autorickshaw bearing No. GTH 3003. P.W.2 collected some more policemen and

proceeded to the main road. At about 4.00 p.m., they sighted an Auto Rickshaw which was driven by the appellant. They stopped it and checked

it and found four gunny bags placed inside the vehicle. The police took the vehicle to the police station and when the gunny bags were opened, ten

packets of charas found concealed therein.

5. The apex Court in the case cited supra has held that if P.W.2 had reason to believe from information given by any person that a narcotic drug

was kept or concealed in any building, conveyance or enclosed place, the requirements to be complied with by him before he proceeded to search

in any building, conveyance or enclosed place were two fold; First is that he should have taken down the information in writing. Second is that he

should have sent forthwith a copy thereof to his immediate superior official. When the witness was asked in cross examination whether he had

taken down the information in writing, he had answered in negative. He did not also apprise his superior officer of any such information either then

or later and no copy of the information was sent to the superior officer. Under the circumstances, the Apex Court has held that it is imperative that

he should have taken the information down in writing and sent a copy thereof to his immediate superior officer. So saying, it has also observed that

the action of the officer who claims to have exercised it on the strength of such unrecorded information would become suspect, though the trial may

not vitiate on that score alone. The Supreme Court chose to acquit the appellant in that case on very many grounds as found in paragraph 23, as

given below, which are relevant for appreciation:

In this case non-recording of the vital information collected by the police at the first instance can be counted as a circumstance in favour of the

appellant. Next is that even the information which P.W.2 recollected from

memory is capable of helping the accused because it indicates that the real culprits would have utilised the services of an autorickshaw driver to transport the gunny bags and it is not necessary that the autorickshaw driver should have been told in advance that the gunny bags contained such offensive substance. The possibility is just the other way round that the said culprits would not have disclosed that information to the autorickshaw driver unless it is shown that he had entered into a criminal conspiracy with the other main culprits to transport the contraband. The prosecution did not adduce any evidence to show any such connivance between the appellant and the real culprits. There is nothing even to suggest that those culprits and the appellant were close to each other, or even known to each other earlier. Yet another circumstance discernible from the evidence in this case is that the police had actually arrayed two other persons as the real culprits and made all endeavour to arrest them, but they absconded themselves and escaped from the reach of the police. But in this case, non compliance of Section 42 and that too non recording of the information and then sending a report to the higher officer alone is said to be the violation.

6. In a similar situation, the Apex Court in *Sajan Abraham v. State of Kerala* reported in 2001 SCC (Cri) 1217 has been pleased to hold as follows:

With regard to Section 42, the submission is that PW 5 has not recorded the information given by PW 3 with respect to the appellant's involvement before proceeding to arrest him in this case. This constitutes violation of Section 42 of the Act. It is true u/s 42(1), the officer concerned, when he has reason to believe from his personal knowledge or information received from any person, is obliged to take it down in writing if such information constitutes an offence punishable under Chapter IV of the Act and send it forthwith to his immediate superior. Such an officer is empowered to search any building, conveyance and in case of any resistance, break up any door or remove any obstacle for such entry, seizure of such drug or substance and to arrest such person whom he has reason to believe to have committed any offence punishable under the said chapter. Thereafter such officer has to send a copy of this information forthwith to his immediate superior. Submission is that P.W.5 after

receiving the said information had not communicated it to his immediate superior which constitutes violation of Section 42. In construing any facts

to find, whether the prosecution has complied with the mandate of any provision which is mandatory, one has to examine it with a pragmatic

approach. The law under the aforesaid Act being stringent to the persons involved in the field of illicit drug traffic and drug abuse, the legislature

time and again has made some of its provisions obligatory for the prosecution to comply with, which the courts have interpreted it to be mandatory.

This is in order to balance the stringency for an accused by causing an obligation on the prosecution for its strict compliance. The stringency is

because of the type of crime involved under it, so that no such persons escapes from the clutches of the law. The court however while construing

such provisions strictly should not interpret them so literally so as to render their compliance, impossible. However, before drawing such an

inference, it should be examined with caution and circumspection. In other words, if in a case, the following of a mandate strictly, results in delay in

trapping an accused, which may lead the accused to escape, then the prosecution case should not be thrown out.

7. The facts of that case are hereunder:

P.W.3, Head Constable got information with reference to the appellant only at about 7.00 p.m. that the person is selling injectable narcotic drugs

near Blue Tronics Junction, Palluruthy. When he proceeded for Palluruthy Police Station to give this information to his immediate superior, S.I. Of

Police, P.W.5, he found P.W.5 along with his police party, who were on patrol duty coming, hence the said information was communicated there

by P.W.3 to P.W.5. Thereafter, P.W.5 along with his police party and P.W.3 immediately proceeded towards the place where the appellant was

standing. Had they not done so immediately, the opportunity of seizure and arrest of the appellant would have been lost. How PW5 could have

recorded the information given by P.W.3 and communicated to his superior while he was on motion, on patrol duty, in the jeep before proceeding

to apprehend him is not understandable. Had they not acted immediately, the appellant would have escaped.

On the above facts, their Lordships did not draw inference that there has been any violation of Section 42 of the Act.

8. The information received in Abdul Rashid Ibrahim Mansuri's case is that one Iqbal Syed Husen was trying to transport charas in an autorickshaw bearing No. GTH 3003. That was a specific information. But, what P.W.6 says in this case is that, on information he proceeded to the spot after sending advance information to the Judicial Magistrate No. II, Erode. In the cross examination, no question was put regarding the information viz., the nature of information, when it was received and so on. The very fact that P.W.6 proceeded straight to the scene of crime viz., the house of the appellant by sending an advance information to the Magistrate shows some urgency for not following Section 42 of the Act. The appellant also could not show what was the prejudice caused to him in non compliance of Section 42 by not recording the information received by P.W.6. as per the ruling in Abdul Rasheed's case cited supra. This point alone will not vitiate the entire prosecution. No other point has been raised by the learned counsel for the appellant in this case. Therefore, I apply the ruling of the Apex Court in Sajan Abraham's case to the facts of the present case and hold the appellant guilty of the offence punishable u/s 20(b) (1) of N.D.P.S. Act.

9. In yet another case rendered in Koluttumottil Razak vs. State of Kerala reported in 2000 SCC (Cri) 829, the Apex Court has held that non compliance with the requirements of Section 42(1) & (2) would render the resultant search and seizure suspect, though that by itself may not vitiate the proceedings. Following the full bench ruling of the Apex Court in Abdul Rashid Ibrahim Mansuri vs. State of Gujarat cited supra, the Court went on further to hold that apart from the evidence of the police officers, there was absolutely no independent evidence to ensure confidence that the search was in fact conducted by P.W.1 as he had claimed, as his evidence was required to be approached with suspicion due to violation of Section 42 of the Act. In the absence of any corroboration from independent sources, Their Lordships chose to allow the appeal of the accused and set aside the conviction and sentence. But in this case, as already noted P.W.1, the Village Administrative Officer and P.W.2, the Head Constable have corroborated the evidence of P.W.6, though P.Ws.4 & 5 turned hostile for the reasons known to them, though they have signed the search warrant. Moreover, P.W.6 in his chief examination simply says that "on information" he went and as I have already held that there is

absolutely no cross examination on this aspect, it is also not in the evidence that P.W.6 did not pass on the information to any of the superior

officers though he has not stated so affirmatively.

10. Taking into consideration the age of the appellant and the relevant circumstances, I am inclined to reduce the sentence of imprisonment to one year.

11. In the result, the judgment of the trial Court stands confirmed in so far as the conviction of the appellant is concerned and the sentence of

imprisonment of two years is reduced to one year. With this modification in sentence, the appeal stands dismissed on merits.