
(2003) 05 PAT CK 0003

In the Patna High Court

Case No : Criminal Appeal No. 478 of 2002

Manbodh Mallah @ Manbodh Choudhary and Sudama Devi

APPELLANT

Vs

The State of Bihar

RESPONDENT

Date of Decision : 23-05-2003

Acts Referred:

Citation : (2003) 05 PAT CK 0003

Final Decision : Allowed

Judgement

I.P. Singh, J.—This is an appeal u/s 374(2) read with Section 389(1) of the Code of Criminal Procedure, 1973 (in short "the Code") also read with Section 36(b) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (in short the Act). The Appellants alongwith one Shanker Dayal Choudhary (since acquitted) were tried for the charge u/s 20(B)(ii) of the Act by Shri Anil Kumar Verma, learned District and Sessions Judge-cum-Special Judge, Bexar in N.D.P.S. Act Case No. 9/99 and Appellant No. 1, Manbodh Mallah was sentenced to undergo rigorous imprisonment for 7 years and to pay a fine of Rs. 70,000/- and in default he was further directed to undergo (sic)porous imprisonment for one and half years. So far as Appellant No. 2, Sudama Devi, was concerned she was sentenced (sic) undergo rigorous imprisonment for 10 years and to pay a fine of Rs. 1,00,000/- (sic)nd in default of payment of fine she was farther directed to undergo rigorous imprisonment for two and half years.

2. The prosecution case, in short, is that Ajay Kumar Mishra (P.W. 2), the Officer Incharge of Rajpur Police Station recorded his own statement on 22.8.1999 near the house of Appellant No. 1, Manbodh mullah alleging, inter alia, that on the same day he received a confidential information that Appellant No. 1 was dealing in Heroin. A raiding party was organized which included Dy. S.P. Buxar and a raid at the house of Appellant No. 1 was conducted. On search 200 gram of Heroin besides a country made pistol with a live cartridge was recovered from the possession of Appellant No. 1 in presence of P.Ws. 5 and 10. A seizure list (Ext. 1) was prepared. Small quantity out of 200 gram of Heroin was sent for chemical

examination at Forensic Science Laboratory, Patna which reported that it contained Heroin. Appellant No. 1 disclosed that he had obtained the Heroin from Appellant No. 2, Sudama Devi and it was to be supplied to another person. Rajpur P.S. Case No. 63/99 was recorded under Sections 20(B)(ii)/21 of the Act.

3. The house of the Appellant No. 2 was also searched and 300 gram of Heroin like substance was seized from her possession. Her son Shanker Dayal Choudhary (since acquitted) was also arrested. The search of her house was made in presence of P.Ws. 3 and 4 and a seizure list vide Ext. 1/1 was prepared in presence of too witnesses. After completing the investigations the police submitted charge sheet.

4. The defence of the Appellants was that they are innocent and had not committed any offence. They have been falsely implicated in this case and no Narcotic drugs much less Heroin was recovered from their possession. The seizure list witnesses have not supported the case of the prosecution. No independent and competent witness has been examined in this case. Appellant No. 2 is a lady and according to Section 50(4) of the Act a female has to be searched by another female only. But Appellant No. 2 was not searched by any female as no female constable was with the raiding party. Moreover according to Section 50 of the Act the search and seizure has to be made before a Gazetted Officer. Only negligible quantity of Heroin has been alleged to have been recovered from the Appellants. On these grounds amongst other it was prayed that the judgment of conviction of the learned court below be set aside and the Appellant be acquitted.

5. According to the case of the prosecution 200 gram of Heroin was recovered from the possession of Appellant No. 1 in presence of two witnesses, namely, Shyam Bihari Rai (P.W. 5) and Jangali Singh (P.W. 10). A seizure list (Ext. 1) was prepared. In their evidence P.Ws. 5 and 10 have completely denied any recovery made in their presence, from Appellant No. 1 or anybody else. Similarly so far as Appellant No. 2 is concerned it has been alleged that 300 Gram of Heroin like substance was recovered from her possession in presence of Kameshwar Singh (P.W. 3) and Bashistha Narayan Bharti (P.W. 4) and a seizure list vide Ext. 1/1 was prepared in presence of these two witnesses. However, in their evidence these two witnesses have also given a complete goby to the case of the prosecution and have not supported the same. They have stated that nothing was recovered from Appellant No. 2 in their presence. Thus apart from the official witnesses there is no-body to support the case of the prosecution about the alleged recovery of Heroin from these two Appellants. This is a great circumstance against the case of the prosecution.

6. It has been further contended that Appellant No. 2 happened to be a lady and she should have been searched by a lady Officer or lady constable. This is not in dispute that there was no lady officer or constable in the raiding party. Drawing my attention to Section 50(4) of the Act it has been submitted that a female has to be searched only by a female but in the present case this has not been done.

As against it on behalf of the prosecution it has been submitted that since only a bag from the house of Appellant No. 2 was taken by the raiding party and, therefore, in that view of the matter there was no physical search of Appellant No. 2 and no female staff was required. As against it my attention has been drawn to the seizure list (Ext. 1/1), in which it has been stated that Sudama Devi (Appellant No. 1) was concealing a substance like Heroin in her Sari. This statement made in Ext. 1/1 clearly goes to show that the recovery of Heroin was made from Appellant No. 2 while she was concealing the Heroin inside her Sari. This is a document of the prosecution and from this it would appear that actually a female should have been employed in terms of Section 50(4) of the Act for her search. This has not been done in complete violation of this provision of law.

7. Drawing my attention to Section 50 of the Act it has been contended that it was incumbent on the raiding party to inform the Appellants that they were entitled to be searched in presence of a Gazetted Officer. This does not appear to have been done. On behalf of the prosecution it has been contended that the raiding party consisted of the Dy. S.P. who happens to be a Gazetted Officer. This will not comply with the mandatory provision of Section 50 of the Act as has been held in the case of Ahmed v. State of Gujrat 2000 (4) P.L.J.R. 124 (S.C.). It has been held in this case that the person to be searched has been afforded the minimum right to be searched before another Gazetted Officer or the Magistrate and that right could not be taken away merely because the Officer who made the search happened to be a Gazetted Officer empowered by the Government. From this also it would appear that there has been non-compliance with the mandatory provision of law as contained in Section 50 of the Act. The Constitution Bench of the Hon'ble Supreme Court in the case of State of Punjab Vs. Baldev Singh, has also held that it was obligatory of the empowered officer and it was his duty before conducting the search of the person to inform him that he has a right to require his search being conducted in presence of a Gazetted Officer and failure to inform the suspect of his right would render the search illegal. On behalf of the Appellant it has been submitted that they were not informed about this right by the raiding party which did not take any step to produce them before a Gazetted Officer at the time of the search. It has been pointed out that this mandatory provision of law has also not been complied with by the prosecution.

8. From the discussions made about it becomes clear that the alleged recovery of Heroin from the possession of the Appellants itself becomes doubtful inasmuch as the seizure list witnesses have not supported the case of the prosecution. From the aforesaid it would appear that the judgment of conviction passed by the learned court below can not be sustained in the eye of law.

9. In the result this appeal is allowed, judgment of conviction of the learned court below is set aside and the Appellants are acquitted of the charges framed against them. It is stated that both the Appellants are in custody. As such they are directed to be released forthwith, if not required in any other case.