
(2004) 03 AHC CK 0268
In the Allahabad High Court
Case No : Criminal Appeal No. 1777 of 1997

Om Prakash (In Jail)	Vs	APPELLANT
State of U.P.		RESPONDENT

Date of Decision : 31-03-2004

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 21, 50

Citation : (2004) 2 ACR 1667

Hon'ble Judges : Mukteshwar Prasad, J

Bench : Single Bench

Advocate : V.P. Srivastava and A.K. Malviya, for the Appellant; A.G.A., for the Respondent

Final Decision : Allowed

Judgement

Mukteshwar Prasad, J.—This appeal by accused Om Prakash son of Sri Sumer is directed against the judgment and order dated 16.9.1997 passed by Sri A.U. Khan, the then Additional Sessions Judge, Ghazipur in S. T. No. 11 of 1996 whereby he convicted the accused u/s 21 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the Act) and sentenced to undergo rigorous imprisonment for a term of ten years and to pay a fine of Rs. One lac. He was also directed to suffer rigorous imprisonment for a period of three years in case fine was not deposited by him.

2. Briefly stated, the facts of the case giving rise to this appeal, are as under:

There is an Opium and Alkaloid factory of Government of India at Ghazipur. The Appellant was employed as an unskilled labourer in the aforesaid factory in the year 1995.

3. On 25.11.1995, he was attending his night duty in the factory.

4. On 26.11.1995 at about 5.50 a.m. accused became free and reached security gate No. 11. He was checked upon by Parvez Khan, Lance Naik C.I.S.F. who

found something tied up between right knee and foot. He informed Shift Incharge A.S.I. Husain Khan. On an enquiry by A.S.I. Husain Khan. Om Prakash pleaded his ignorance. On the instruction given by A.S.I. Husain Khan, Assistant Commander K. S. Kera, a Gazetted Officer was summoned. He arrived there. Sri M. S. Chauhan, Dy. Chief Chemist, and Aziz Beg, Sales Manager also arrived there and in the presence of all on the direction of A.S.I. Husain Khan, Parvez Khan took search of the accused and found a polythene packet which was tied up with his leg with the help of a rope. The Chemist disclosed that he was carrying crude Alkaloid cake. On weighing 206 gms. Alkaloid was found". Two samples each of 24 grams were taken out separately and sealed separately and remaining 158 grams was sealed separately. The samples of seal were prepared on the spot. The accused was formally arrested. A seizure memo was prepared by A.S.I. Husain Khan. The recovered contraband and accused were sent to Police Station Kotwali, Ghazipur and a formal F.I.R. was lodged there. The local police registered a case at Crime No. 227 u/s 21 of the Act.

5. S. I. Satya Ram Verma started investigation of the case. He interrogated the accused. Thereafter investigation was handed over to S.I. R. K. Rai. He inspected the samples of recovered article and sent the sample to the Forensic Science Laboratory, Lucknow. The sample was received there on 23.12.1995. After chemical examination, the sample was found to be Morphine. S.I. Madan Lal Verma interrogated all the witnesses, named above and prepared a site plan at the pointing out of A.S.I. Husain Khan. After completing investigation, he sent charge-sheet to the Court.

6. The accused (Om Prakash) was charged u/s 21 of the Act on 30.7.1996 to which he pleaded not guilty and claimed to be tried.

7. At the trial, the prosecution examined P.W. 1 A.S.I. Husain Khan, P.W. 2 Head Constable Ram Lachhan, who made entries in the G.D., P.W. 3 Lance Naik Parvez Khan, P.W. 4 Ram Das Bharti who prepared chik report on 26.11.1995, P.W. 5 Constable Anirudh Bahadur Singh who took the sample to Forensic Science Laboratory, Lucknow and deposited the same on 23.12.1995, P.W. 6 S.I. Satya Ram Verma, Ist Investigating Officers and P.W. 7 Madan Lal Verma I Ind Investigating Officer of the case.

8. Accused in his statement recorded u/s 313, Cr. P.C. admitted that he was employed in Opium Factory as an unskilled labourer on the impugned date but he totally denied his checking at the security gate as well as seizure of any contraband from his possession. He was taken to Kotwali. According to the accused, the employees and officers of the Opium Factory were annoyed with him and all of them hatched a conspiracy to oust him out from the employment and falsely implicated him on account of enmity. He, however, adduced no oral or documentary evidence in his defence.

9. After considering the entire evidence on record led by the prosecution and considering the arguments also advanced on behalf of the parties, learned Judge

found the accused guilty for the offence punishable u/s 21 of the Act and convicted and sentenced him, as indicated above.

10. Aggrieved by his conviction and sentence, the accused has come up in the appeal.

11. I have heard learned Counsel for the parties and have gone through the record carefully.

12. Learned Counsel for the Appellant has vehemently urged that there has been no compliance of the provisions of Section 50 of the Act, which are mandatory and Appellant was not given any option to exercise his right to be searched in presence of a Gazetted Officer or nearest Magistrate. Sri K. S. Kera, Assistant Commandant, C.I.S.F. was summoned by A.S.I. Husain Khan and a telephonic message was sent to him. He is said to have reached the spot and recovery was made in his presence. He, however, did not sign the Fard recovery nor he was examined in the Court. Moreover, delay took place in sending sample to Forensic Science Laboratory, Lucknow, for analysis and no link evidence was produced.

13. Reliance was placed by the learned Counsel for the Appellant on the following decisions:

(1) State of Punjab v. Baldev Singh 1999 (2) ACR 1694 (SC) : (39) 1999 ACC 349.

(2) Beckodan Abdul Rahiman v. State of Kerala 2002 (2) ACR 1373 (SC) : 2002 (2) JIC 157 (SC).

(3) Koluttumottil Razak v. State of Kerala (43) 2001 ACC 170.

(4) State of Punjab Vs. Balbir Singh, .

14. On the other hand, learned A.G.A. supported the judgment and contended that the Appellant was an employee of Opium Factory and he was checked and searched upon in the presence of a Gazetted Officer at the gate of factory and there was no question of falsely implicating him.

15. After considering all submissions made on behalf of the parties, and perusing the decisions relied upon by the learned Counsel for the Appellant and looking to the facts and evidence on record led by the prosecution. I find that the trial Judge erred in appraisal of the evidence on record and did not arrive at correct conclusion.

16. Admittedly, the Appellant was an employee of Opium Factory, Ghazipur and he attended his night duty in the factory on 25.11.1995. It is further admitted that on 26.11.1995 at about 5.50 a.m. the Appellant was coming out of the factory and reached gate No. 11. P.W. 3 Parvez Khan Lance Naik was present there at gate No. 11 and he checked up the Appellant. P.W. 3 Parvez Khan testified in his cross-examination in clear words that Sentry on duty used to check employees of the factory with a view to ensure that no narcotic drug is

taken out by any member of staff out of the factory. In the instant case, he suspected that something was tied up with leg of the Appellant and according to him, the Appellant was carrying some narcotic drug. He, therefore, informed the Shift Incharge A.S.I. Husain Khan who questioned the Appellant in this regard. The Appellant replied in negative and pleaded his ignorance. Thus, it is clear from the testimony of Parvez Khan and P.W. 1 Husain Khan that there was prior information that Appellant was having some contraband on his person. A.S.I. Husain Khan further admitted that he instructed Parvez Khan to call Sales Manager Aziz Beg, Deputy Chief Chemist M. S. Rawat, and Assistant Commander K. S. Kera. The testimony of Parvez Khan and Husain Khan is totally silent on the point that the accused was apprised of his right that if he so requires, he could be taken to a nearest Gazetted Officer or nearest Magistrate and in their presence, he would be searched. In the instant case, a Gazetted Officer was summoned to the spot on the instruction of Husain Khan but the Appellant was given no opportunity to exercise his valuable right. It is well-settled now that the provisions of Section 50 of the Act are mandatory and have to be complied with. It is further settled that the provisions of Section 50 are attracted in the case of personal search only. The Appellant had allegedly tied up a packet of polythene, which contained C.A.C. Therefore, in view of the decision of the Constitution Bench in *State v. Baldeo Singh* (supra), the Appellant is entitled to be acquitted.

17. I further find that Appellant was arrested and C.A.C. was recovered from his possession on 26.11.1995 and sample was taken out on the spot. Subsequently, sample and recovered cake were deposited at the Police Station Kotwali on the same day. However, sample was received at the Forensic Science Laboratory on 23.12.1995, i.e., after about one month and this delay in sending the sample for analysis was not explained satisfactorily by the prosecution.

18. It is further noteworthy that K. S. Kera neither signed the seizure memo nor examined by the prosecution in the Court for the reasons best known to it.

19. In view of the aforesaid discussion and scrutiny of the evidence on record and non-compliance of the provisions of Section 50 of the Act, I hold that the learned trial Judge was not justified in convicting the Appellant. The prosecution could not bring home the charge against the Appellant beyond reasonable doubt. Consequently, the Appellant is entitled to be acquitted.

20. In the result, the appeal succeeds. The conviction and sentence passed against the Appellant are hereby set aside. He is acquitted. He is on bail. His bail bonds are cancelled and sureties are discharged.