
(1999) 08 AP CK 0108

In the Andhra Pradesh High Court

Case No : Criminal A. No. 181 and 192 of 1994

Purushotham Das and others

APPELLANT

Vs

State of A.P. and others

RESPONDENT

Date of Decision : 11-08-1999

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161(3)
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 20(I), 29, 41, 42, 43

Citation : (1999) 6 ALD 285 : (1999) 2 ALD(Cri) 727 : (1999) 2 ALT(Cri) 400 : (1999) CriLJ 4817

Hon'ble Judges : D.S.R. Varma, J

Bench : Single Bench

Judgement

1. Accused Nos.1 to 3 preferred Criminal Appeal No. 181 of 1994, whereas accused Nos.4 to 6 preferred Criminal Appeal No.192 of 1994 against the judgment dated 4-2-1994 in Calender Case No.32 of 1993 on the file of the Additional Sessions Judge, Vizianagaram, wherein the appellants were convicted u/s 8(c) read with Section 29(b)(i) of Narcotic Drugs and Psychotropic Substances Act, 1988 - for short "the Act", and sentenced them to suffer rigorous imprisonment for five years.

2. Since both the appeals are directed against the same judgment, they are disposed of by this common judgment.

3. The brief facts of the prosecution case as follows : O 26-9-1993 at about 5.30 a.m., all the accused were found in front of the Casuarina tope of Lankalapalli Papanna near Champavathi River of Nathavalasa junction. The Sub-Inspector of Police, Pusapatirega Police Station found the accused in possession of one plastic bag each in which Ganja was packed with brown and English papers and kept in plastic cement bags ranging from 6 Kilograms to 8 Kilograms with each accused. The accused were in possession of Ganja without any licence. PW2 took samples and arrested the accused and seized the Ganja. PW4 registered a case basing on

such report under the Act. Further investigation revealed that the samples of Ganja belonging to the family of Cannabinaceae.

4. The plea of the accused is one of denial. On behalf of prosecution PWs.1 to 4 were examined. PW1 is the village Administrative Officer. PW2 is the person who took balance to weigh the material seized by the police. PW3 is the constable who had gone along with the raid party. PW4 is the Sub-Inspector of police. Exs.PItoP6 were marked on behalf of prosecution.

5. Ex.PI is the Mediators report regarding the seizure, Ex.P2 is the Mediators report regarding weighing. Ex.P3 is the rough sketch of the scene of offence. Ex.P4 is the First Information Report. Ex.PS is the copy of the letter of advice sent to Analyst. Ex.P6 is the Analyst report. On behalf of defence a contradiction in the statement of PW2 recorded u/s 161(3) Cr.PC was marked as Ex.DI.

6. The material objects are samples weighed by PW4 and attested by PW2. The said material objects are 36 in number. The further details with regard to the material objects are not relevant for purpose of deciding the case on hand.

7. The contention of the learned Counsel for the appellants is that .the procedure prescribed under Sections 50 and 57 of the Act which are mandatory has not been followed in this case, and hence, the appellants are not liable to be punished and the judgment of the trial Court is liable to be set aside.

8. The learned Counsel for the appellants did not argue on other merits of the case, except with regard to non-compliance of the mandatory provisions under the Act viz., the procedure prescribed under Sections 50 and 57 of the Act. It is his further contention that the procedure prescribed under Sections 50 and 57 of the Act was incorporated to avoid misuse of the powers by the authorities by implicating innocent people. He further contends that it is imperative on the part of the authorities to follow the procedure prescribed under Sections 50 and 57 of the Act.

9. On the other hand, the learned Public Prosecutor vehemently opposed such contentions, and submitted that these issues were not raised before the trial Court by the accused and as such, they are not available to the appellants before this Court. He further submitted that the procedure as prescribed has been strictly complied with before search and seizure, and therefore, the finding of the trial Court after considering the entire evidence and material placed on record is absolutely proper.

10. Therefore, the only question that arises for consideration in these appeals is "whether the procedure under Sections 50 and 57 of the Act is mandatory or not, if so, whether the same was followed or not, and what is the effect if such procedure is not followed?"

11. It is pertinent to refer the provisions under Sections 50 and 57 of the Act which reads as follows :

"50. Conditions under which search of persons shall be conducted:-(1) When any officer duly authorised u/s 42 is about to search any person under provisions of Section 41, Section 42, or Section 43, he shall if such person so requires, take such person without unnecessary delay to the nearest Gazetted Officer of any of the Departments mentioned in Section 42 or to the nearest Magistrate.

(2) If such requisition is made, the officer may detain the person until he can bring him before the Gazetted Officer or the Magistrate referred to in subsection (1).

(3) The Gazetted Officer of 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.

(4) No female shall be searched by any one excepting a female.

Section 57:--

57. Report of Arrest and Seizure :-- 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."

12. The learned Counsel appearing for the appellants vehemently content that the procedure prescribed under the above sections of the Act, was not followed, and non-compliance of the mandatory provisions of the Act would cause serious prejudice to the accused, and therefore, the accused are entitled to claim benefit of doubt.

13. Section 50 of the Act deals with the conditions under - which search of a person shall be conducted. The learned Public Prosecutor submits that the said provision postulates that any officer authorised is about to search any person under the provisions of Sections 41, 42, 43, shall take such person in order to avoid delay to the nearest Gazetted Officer or to the nearest Magistrate. The learned Public Prosecutor lays stress on the words "if such person so requires." In this behalf he submits that Sections 41, 42 and 43 are under different contingencies, but those three provisions do not deal with search with regard to persons. He submits that only when a search of person is to be effected by the authorised officer, the procedure prescribed u/s 50 of the Act has to be followed. In the instant case since the accused were found with bags containing Ganja, there was no need for search of the persons. Therefore, according to the learned Public Prosecutor, Section 50 has application only when search as to person is required, and further, the Officer need not necessarily inform the accused about his option whether the accused requires himself to be taken to the nearest Gazetted Officer or the Magistrate. On the contrary, according to him, only if such person so requires, then only it is incumbent upon the authorised officer to take him to the nearest Gazetted Officer or the Magistrate. He further contends that in the present case since the accused did not require the authorised Officer

to take them to such Gazetted Officer or the Magistrate, the same was not done, and in such an event, that course of action need not necessarily be complied with.

14. On these submissions, the learned Counsel for the appellants took this Court through the evidence of PW4 who is the authorised Officer, which is to the following effect: "1 searched the accused before putting him in the lock up, 1 did not inform the accused that if they want that they should be taken to a Magistrate for search." In view of the specific admission by P\\V4, the authorised Officer, it is clear that Section 50 provision which is mandatory in nature was not followed. In support of his contention, the learned Counsel for the appellant relies on a judgments of this Court in J. Prakash Vs. State, . In the said judgment, this Court having dealt with various judgment in State of Punjab Vs. Balbir Singh, ; All Muslafa Abdul Rahman Moose v. State of Kerala, AIR 1995 SC 2447; Mohinder Kumar Vs. The State, Panaji, Goa, ; T. f. Razak Allan Nagappan Razak v. State of Kerala, 1995 Suppl. (4) SCC 256; Syed Mohd. v. Syed Omar Syed, 1995 CLJ 2662, held that Section 50 is a mandatory provision since it goes to the root of the matter,

15. Though the learned Judge referred to the judgment in Namdi Francis Nwazor v. Union of India and another, 1997 CCR 27 (SC), while coming to the conclusion that Section 50 is mandatory, 1 feel it necessary to re-extract the relevant portion of the said judgment which is in the following terms :

"On a plain reading of sub-section (I) of Section 50, it is obvious that it applies to cases of search of any person and no search of any article in the sense that the article is at a distant place from where the offender is actually searched. This position becomes clear when we refer to sub-section (4) of Section 50 which in terms says that no female shall be searched by any one excepting a female. This would, in effect, mean that when the person of the accused is being searched the law requires that if that person happens to be a female, the search be carried out only by a female. Such a restriction would not be necessary for searching the goods of female which are laying at a distant place at the time of search. It is another matter that the said article is brought from the place where it is lying to the place where the search takes place but that cannot alter the position of law that the said article was not being carried by the accused on his or her person when apprehended. We must hasten to clarify that if that person is carrying hand bag or like and the incriminating article is found therefrom, it would till be a search of the person of the accused requiring compliance with Section 50 of the Act. However, "when an article is lying elsewhere and is not on the person of the accused and is brought to a place where the accused is found, and on search, incriminating articles are found therefrom, it cannot attract the requirements of Section 50 of the Act for the simple reason that it was not found on the accused person. So, on the facts of this case, it is difficult to hold that Section 50 stood attracted and non-compliance with that provision was fatal to the prosecution case."

16. Now coming to the case on hand, the case of the prosecution is that the

authorised Officer found the accused A1 to A6 coming from Casuarina tope carrying each one plastic bag and they were chased and caught hold of and in view of the clarification accorded in the passage of the judgment referred to above, the search of the person who are carrying on bags containing incriminating material has to be performed in strict compliance with Section 50 of the Act. The only exception or the fact that could be distinguished is that when contraband articles are lying elsewhere and not on the person of the accused and when the same is brought to the place the accused were found and search there on is not attracted by Section 50 of the Act. Therefore, in view of the fore-going discussion and the judgment by this Court and the apex Court, I am of the considered view that in the present case, Section 50 of the Act ought to have been strictly followed by indicating the accused persons with regard to the requirement of taking them to the nearest Gazetted Officer or the Magistrate for effecting such search and any deviation from the said procedure prescribed u/s 50 of the Act vitiates the case of the prosecution and the conviction thereon.

17. As regards the contention of the learned Counsel for the appellants that Section 57 of the Act also was not followed viz., the authorised officer did not make full report of the particulars of such arrest or seizure to his immediate officer. In this connection, the learned Counsel reliefs on the statement of PW4 in his deposition which is as follows :

"1 registered ExPI as a case in Cr.No.82/93 u/s 20(b)(1) of TSDPS Act. Ex.P4 is the FIR. I submitted the copies of P4 to all the concerned."

The learned Public Prosecutor submits that since PW4 has stated categorically that copies of FIR had been submitted to all the concerned, there is no violation of Section 57 of the Act. He further submits that the said statement was not disputed in any manner during the course of trial on behalf of the accused.

18. For this the learned Counsel for the appellants submits that since this is a question of law, even though that statement was not disputed specifically, that does not mean that the said statement was accepted for the simple reason that no material evidence has been placed before this Court.

19. However, this question need not be gone into in detail, in view of my forey going discussion and conclusion that the accused is entitled for the benefit of doubt for want of compliance of the provisions u/s 50 of the Act.

20. In the result, the appeal is allowed and the impugned judgment convicting and sentencing the accused-appellants is set aside. The appellants-accused who have been on bail need not surrender their bail bonds and they are hereby cancelled.