
(2003) 07 P&H CK 0082
In the Punjab And Haryana At Chandigarh
Case No : Criminal Appeal No. 258-SB of 1994

Shyam Lal

APPELLANT

Vs

State of Haryana

RESPONDENT

Date of Decision : 16-07-2003

Acts Referred:

Citation : (2003) 4 RCR(Criminal) 111

Hon'ble Judges : Mehtab S.Gill, J

Advocate : Mr. R.S. Cheema, Senior Advocate with Ms. Tanu Bedi, Advocate. Mr. G.B.S. Dhillon, Deputy Advocate General, Punjab., Advocates for appearing Parties

Judgement

Mehtab S. Gill, J.

1. Appellant was convicted by Additional Sessions Judge, Kurukshetra under Section 18 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter called "the Act").
2. Prosecution story is that on December 8, 1992 Sub Inspector Ram Charan, who was present along with Assistant Sub Inspector Ishwar Singh, Head Constable Teg Singh and Constable Chura Ram in front of grain market. Ismailabad, received secret information, that accused Shyam Lal along with one person is coming on a motorcycle and that they are in possession of opium. Ruqa (Exhibit PA) was sent to the police station, on which a formal First Information Report (Exhibit PA/1) was recorded.
3. Sub Inspector Ram Charan along with the raiding party laid a naka on PehowaIsmailabad road. Accused was signalled to stop. The Motorcycle slowed down, but the pillion rider, who was, later on, identified as Deepak son of Shyam Lal, ran away. Accused Shyam Lal was apprehended and later on produced before Subash Yadav, Deputy Superintendent of Police as requested by the accused. Opium weighing 2.5 kgs was found on the person of Shyam Lal.
4. Prosecution, to prove its case, produced PW1 Chander Pal, Sub Inspector, PW2

Jawala Singh, Sub Inspector, PW3 Naresh Kumar Sub Inspector, PW4 Om Parkash, Head Constable, PW5 Ravi Dutt Constable, PW6 Subhash Yadav, Deputy Superintendent of Police, PW7 Ishwar Singh, Assistant Sub Inspector and PW8 Ram Charan, Sub Inspector.

5. I have heard the learned counsel for the appellant and the learned counsel for the respondent and gone through the record with the assistance of the counsel.

6. Learned Senior counsel Shri R.S. Cheema, for the appellant has drawn my attention to the statements of PW6 Subhash Yadav, Deputy Superintendent of Police, PW7 Ishwar Singh, Assistant Sub Inspector and PW8 Ram Charan, Sub Inspector. He pointed out the discrepancies in the statements of these three witnesses. He has further stated that the mandatory provisions of Sections 50 and Section 42 of the Act were not complied with. He has further stated that Deepak son of Shyam Lal, who was charged by the trial Court, but was acquitted on the ground, that on the date of occurrence, he was present in the Court of Sessions Judge, Kurukshetra. He has further stated that the accused was apprehended at about 5.15 P.M. and the presence of accused Deepak at the place of occurrence was not possible, as on that date, he had moved a bail application in the Court of Sessions Judge, Kurukshetra, where he remained present till 5.00 P.M. The application moved by accused Deepak, has come on record as Exhibit DA. In the application, he has stated that his father Shyam Lal is in custody of the police for the last two days.

7. PW6 Subhash Yadav, Deputy Superintendent of Police, has stated in his testimony that accused Shyam Lal was produced before him at his residence. He has further stated that no independent witness was joined in the investigation. He has further stated that he signed the recovery memo while sitting in his office.

89. PW7 Ishwar Singh, Assistant Sub Inspector/Station House Officer has stated that he had secret information against the accused and he wanted to have him searched before a Gazetted Officer.

10. From the statements of the prosecution witnesses, it is clear that, no offer at all was made to the accused by the Investigating Officer, whether he wanted to be searched before a Magistrate or any other Gazetted Officer, thus, violating the mandatory provisions, as envisaged under Section 50 of the Act.

11. PW8 Ram Charan, Sub Inspector, the Investigating Officer of this case, in his testimony, has stated that after the accused was apprehended, he was produced before the Deputy Superintendent of Police, as requested by the accused that he wants to be searched by a Gazetted Officer. This statement of the Investigating Officer is not corroborated by PW7 Ishwar Singh, who as discussed above, has stated otherwise. Ram Charan has stated that all writing work was completed at the Rest House and he went to the place of occurrence only to prepare the site plan (Exhibit PF). He has further stated in his testimony that he remained in the Rest House till 7.30 P.M. and it was during this period that all the writing work was done.

12. Learned counsel for the State has laid much stress on this aspect that the Deputy Superintendent of Police, a Gazette Officer, could not reach the place of occurrence due to nonconveying of the wireless message and thus, the Investigating Officer did not have any other option but only to take the accused to the residence of the Deputy Superintendent of Police. This argument does not cut any ice, as it is well known, that officers of the police have wireless sets to communicate with each other. In his testimony before the Court, the Investigating Officer Ram Charan has not stated anywhere that wireless message could not be sent to PW6 Subhash Yadav, Deputy Superintendent of Police, who, at the time of apprehending of the accused, was present in the Rest House. As discussed earlier, no offer was made to the accused as to whether he wants to be searched by a Gazetted Officer or by a Magistrate. Accused was only told that he is going to be searched in the presence of PW6 Subhash Yadav, Deputy Superintendent of Police, who was sitting in the Rest House. The procedure, adopted for the arrest of the accused and further for taking the accused into custody, was in complete violative of the provisions of Sections 42 and 50 of the Act.

13. Learned counsel for the appellant has placed reliance on a judgment of the Hon'ble Supreme Court rendered in the case of State of Punjab v. Balbir Singh, 1994(1) Recent Criminal Reports 736 (SC) wherein it was held by the Apex Court that the provisions of Section 50 of the Act are mandatory. In the case in hand, no offer was made to the accused as to whether he wants to be searched by a Gazetted Officer or by a Magistrate. No message was sent to PW6 Subhash Yadav, Deputy Superintendent of Police that he should reach the place of occurrence, so that the search could be conducted on the person of the accused in his presence but in complete violation of the Act, accused was taken into custody and then brought to the Rest House, where the Deputy Superintendent of Police was residing.

14. PW6 Subhash Yadav, Deputy Superintendent of Police, has stated that he retained the seal with him, while rest of the witnesses, who came into the witness box, have not corroborated the statement of PW6 Subhash Yadav. They have stated the the seal, after being used, remained in the custody of PW8 Ram Charan, Sub Inspector.

15. Learned counsel has drawn my attention to a judgment of the Hon'ble Supreme Court rendered in the case of Saiyad Mohd. Saiyad Umar Saiyad and others v. State of Gujarat, 1995(3) Supreme Court Cases 610 : 1995(2) RCR(Crl.) 388 (SC), wherein the Hon'ble Supreme Court has held that the provisions of Section 50 are mandatory. It is incumbent upon the Investigating Officer to inform the accused of his right to choose, to be searched in the presence of a Gazetted Officer or a Magistrate. This burden is on the prosecution to prove that the accused was made aware of this right, but the accused chose otherwise not to be searched before a Gazetted Officer or a Magistrate. If there is no evidence to this effect, then the Court must assume that the accused was

not informed of his right and must find that the possession of the illicit articles was not established. In the case in hand, accused was not given any offer as to whether he wants to be searched before a Gazette Officer or a Magistrate, but as per the testimony of PW7 Ishwar Singh, Assistant Sub Inspector, accused was merely told that he is going to be searched before the Gazette Officer, i.e., PW6 Subhash Yadav, Deputy Superintendent of Police, who, at that time, was sitting in the Rest House.

16. Learned counsel has further drawn my attention to a judgment of the Hon"ble Supreme Court rendered in the case of State of Punjab v. Baldev Singh, 1999(3) RCR(Criminal) 533, wherein the Hon"ble Supreme Court had held that under Sections 50 and 42 of the Act, it is imperative on the officer to inform the accused that he has a right of search before Magistrate or Gazetted Officer. This information may not necessarily be in writing. Prosecution has to establish the fact that the offer was made. It was further held that if search is not conducted as per option of accused, it would vitiate the conviction and sentence of the accused.

17. Learned counsel has further drawn my attention to a judgment of the Hon"ble Apex Court rendered in the case of Mohinder Kumar v. State Panaji, Goa, 1998(8) SCC 655, wherein the Hon"ble Supreme Court had held that chance recovery of narcotic drugs by a police office, not being an empowered officer and also who does not follow the procedure, as prescribed in the Act, non compliance with mandatory requirements of the provisions of Sections 42(1), (2) and 50, vitiates the conviction.

18. Learned counsel for the State has placed reliance on a judgment of the Hon"ble Supreme Court rendered in the case of State of U.P. v. Rashid and others, AIR 2003 Supreme Court 1243, wherein it has been held by the Hon"ble Apex Court that it is not necessary if one of the accused is given the benefit of doubt, the other accused, upon the same testimony, cannot be convicted. This authority does not apply to the case in hand. Deepak accused was given the benefit of doubt as he, at the time of occurrence, was present in the Court of Sessions Judge, Kurukshetra.

19. He has further placed reliance on a judgment of the Hon"ble Supreme Court rendered in the case of Amar Singh v. Balwinder Singh and others, AIR 2003 Supreme Court 1164 : 2003(1) RCR(Crl.) 701 (SC), wherein it was held by the Apex Court that failure or omission of the Investigating Officer to comply with certain provisions, cannot render prosecution case doubtful or unworthy of belief. This authority will also not apply to the case in hand, as the provisions of Section 50 of the Act are mandatory. In the case in hand, provisions of Sections 50 and 42 of the Act were not complied with. Rather, there was a complete violation of the mandatory provisions.

The case of the prosecution can not sustain with this evidence. Resultantly, this appeal is allowed. The judgment passed by Additional Sessions Judge

Kurukshetra is set aside.

Accused stands acquitted.