
(1999) 04 AP CK 0096

In the Andhra Pradesh High Court

Case No : Criminal Appeal No. 889 of 1996

Singarasu Venkayamma

APPELLANT

Vs

State, Excise Inspector, Chirala Excise Range

RESPONDENT

Date of Decision : 02-04-1999

Acts Referred:

Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 17, 42

Citation : (1999) 1 ALD(Cri) 935 : (1999) 4 ALT 7 : (1999) 2 ALT(Cri) 144 :
(2000) 70 ECC 631 : (1999) 4 RCR(Criminal) 703

Hon'ble Judges : Bilal Nazki, J

Bench : Single Bench

Advocate : M. Subba Reddy, for the Appellant; Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

Bilal Nazki, J.—This is an appeal against conviction and sentence of the appellant u/s 17 of the N.D.P.S. Act, 1985. The accused has been sentenced to rigorous imprisonment of 10 years and fine of Rs. 1,00,000/-, in default she has to suffer simple imprisonment for 2 1/2 years. The case of the prosecution before the trial Court was that, at about 12.30 noon on 26-9-91 a house bearing Door No. 19-11-7 situated at Golivari street, Ganjipalem of Chirala town was searched by the Assistant Excise Superintendent accompanied by other witnesses. The accused was found in the house. Search warrant was served on the accused. P.Ws. 2 and 5 searched the house in presence of P.W.1 and L.W.2 and found a wooden box on the northern corner of the room near the door way. Box was opened, a blue coloured polythene packet was found. The said packet contained small paper packets in which opium was found. In all there were 10 paper packets weighing about 120 grams of opium. One paper packet of opium was taken as sample for being sent to Chemical Examiner for analysis, the remaining 9 paper packets were packed in a separate paper packet. P. W.3 Excise Sub-Inspector affixed the seals, the accused did not justify the possession of the

opium. P.W.3 arrested the accused, seized the contraband. P.W.4 registered the case. He also took steps for getting the sample examined by the Chemical Examiner and a report was obtained which showed the seized " material as opium. Six witnesses were examined by the prosecution. One witness was examined by D.W.1. Search proceedings, Panchanama, Search list, F.I.R., Requisition by Excise Sub-Inspector, Chirala to Chemical Examiner, Chemical Analysis report and Certificate issued by P.W.5 were exhibited as Exs.P-1 to P-7 respectively.

2. P.W.1 is the Junior Assistant in M.R.O.'s office. He stated that he knew the accused; she was staying in Ganjipalem in Chirala. He submits that on 26-9-1991 at about 12.30 p.m. one Excise Superintendent came to his office and on the instructions of M.R.O. he went to the place of occurrence. By the time he reached there, four or five persons who were known to him were there. The accused was present in the house. The Excise officials served the proceedings on the accused. The witness states that he attested the proceedings which had been written by the Excise officials which was marked as Ex.P-1. Excise constable entered the house of the accused and found a wooden box. From the box 10 packets were found in one polythene cover. The Excise officials and myself thought that it was opium. The opium was weighed, the total weight was 120 grams. Sample was taken from one of the packets. Sample packet was shown to the witness. The witness did not identify the packet. He admitted the signatures on panchanama. He also submitted that the accused and case property were taken to the Chirala Police Station. In his cross-examination he stated that he cannot say who were the persons in civil dress at the house of the accused when he went there. He also stated that he cannot state whether the officers who were in civil dress were the persons who had detained somebody with opium and then had come to M.R.O. office for further action. He states that after his arrival the contraband was brought from the house and kept in the verandah by a constable. He also states that it is not in his knowledge that the house in question belongs to one Kurapti Veeramma w/o Venkaiah. He did not see Kurapti Veeramma aged about 75 years at the house when the occurrence took place. He did not agree with the suggestion that there was no door number of the house of the accused. He stated that inside the house of the accused there was a partition by means of Thadika. He also says that he did not remember how many gallies one had to cross from the main road to reach the house of the accused. This witness stated that in all 120 grams was seized. He also stated that sample was taken from one of the packets. It is also important to note from the testimony of P.W.1 that he was not himself a witness to the actual search of the wooden box. It is also important to note from the statement of the witness that the actual search of the packets was done by a Constable.

3. P. W.2 is the person who was Asst. Prohibition & Excise Superintendent, District Task Force, Guntur at the relevant time. He stated that on 26-9-1991 he accompanied a raiding party and P.W.1 and L.W.2 proceeded to the house of the accused situated in Ganjivari street of Chirala having Door No. 19-11-7. He

states that he visited the house of the accused at 12.15 p.m. The accused was present in the house, search proceedings were served on her. He states that, "We searched the house of the accused and found one polythene packet kept in a wooden box on the northern room of the house. The polythene packet was opened and found 10 small packets". The witness identified the contraband. Total contraband was 120 grams. He further stated that he took the sample from the contraband for Chemical examination. He states that one packet was taken as sample. The witness identified the sample packet. He also stated that, accused was arrested and in the presence of 2 mediators a report was drafted. The accused was taken to Chirala Excise Station. In cross-examination he states that he had prior information about the contraband. Prior information was not reduced into writing. He states that it was the practice of the officials not to reduce it into writing. He submits that he knew that the procedure under the N.D.P.S. Act was to reduce such information into writing. He did not inform his superiors. He also admitted that he has not obtained any search warrant from the competent Court. He also admitted that he has not taken any authorisation in writing from his superiors for this search. He however stated that after the search he had communicated it to the superiors on 27-9-1991. He further stated that the Assistant Commissioner of Excise was his superior. He did not know when the information was received by the Joint Commissioner of Excise. He stated that he gave information by a telegram. He was not aware as to what procedure has to be followed for search under N.D.P.S. Act. He had not informed the Police Station in Chirala. He did not go to the Police station before or after the search. He had taken the assistance of Constable to identify the accused in her house. He said that the house of the accused is one room, one hall and a pancha. It is a thatched house. The said room in the house is separated by thatched fencing. He stated that he did not know whether the owner of the house bearing No. 19-11-7 was one Kurapati Veeramma. He stated that the accused was staying in this house since two years prior to the incident. He had no idea that Kurapati Veeramma was addicted to opium and she was 70 years old. He also said that Kurapati Veeramma was not in the house at the time of the search. He also did not agree with the suggestion that the case was filed against accused for the reason that Kurapati Veeramma, owner of the house was an old lady. He did not make any enquiries or investigation to ascertain how many persons were residing in the house of the accused. He stated that he had requested M.R.O. Chirala to take P.W.1 as mediator. There was only one wooden box in the room where the contraband was detected. The wooden box was opened by L. W.5 who was Excise Sub-Inspector, Nellore. The search was conducted by him in the presence of the witnesses and also in the presence of the mediators. L.W.5 was not given any instructions in writing as the witness was supervising the same. He denied the suggestion that Exs.P-1 to P-3 were prepared in the Excise Station. He denied the suggestion that he was not present at the time of seizure and search. He also admitted that he did not call any neighbours.

4. By analysing the evidence of this witness following things come to light, (1)

that the witness reached the house of the accused at 12.15 p.m., (2) that he was not aware of the search procedure contemplated under N.D.P.S. Act, and (3) that the actual search of the box was conducted by L.W.5.

5. P.W.3 is G. Audinarayana. He stated that he worked as Excise Sub- Inspector, Nellore. He corroborates to what the P.W.2 had stated and states that on 26-9-91 he alongwith others proceeded to the house of the accused. The accused was present, he did not give any time. He states that they found a wooden box in the house and in that box a polythene packet was found and in that polythene packet there were 10 small paper packets, the 10 packets were opened and found opium in those packets, all the packets weighed and found to be of 120 gms. One packet was taken as sample, the remaining packets were kept in separate packet. Accused was arrested. Mediator's report was drafted. He identified his signatures on Ex.P-2. The accused was then handed over to the Chirala Excise Station. In cross-examination he stated that he had not filed any order from the Assistant Commissioner of Excise to conduct the search. He also stated that no record was filed pertaining to any instructions given by P.W.2 to conduct the search. He also stated that the department had not deputed any officer in civil dress in advance to the house of the accused. He also stated that except the officials, mediators and the accused nobody else was present in the house at the time of search. He also stated that they had requested the M.R.O., Chirala to depute one staff member to act as a mediator. He did not agree with the suggestion that the mediators were only brought after search had been conducted. He stated that they had started from Nellore and on way they did not search any other house. He did not know the officer who had given the information to his superiors about the accused possessing the contraband.

6. P.W.4 is the concerned Sub-Inspector of Excise. He submits that, on 26-9-91 he received the mediator's report i.e., Ex.P-2 with the property and also the accused from P.W.2. Ex.P-1 he identified by which crime was registered as Crime No. 79/91. He stated that, accused was sent to judicial custody to Additional District Court. He stated that on 17-5-92 he sent the requisition forwarding the sample to F.S.L. The requisition was marked as Ex.P-5. He received the report of F.S.L. and the report was marked as Ex.P-6. He stated that, investigation was done further by L.W.9. He stated in cross-examination that he had no personal knowledge as to who conducted the search and who arrested the accused. However, he stated that on the basis of record P.W.3 had arrested the accused and search was conducted in presence of P.W.2.

7. P.W.5 was Commissioner of Chirala Municipality at the relevant point of time. He had issued a certificate to the effect that the accused was residing in the house bearing Door No. 19-11-7 of Ward No. 23 situated in Golivari street of Chirala. This certificate was identified by him and it was exhibited as Ex.P-7. In cross-examination he stated that he had no personal knowledge nor any records of ownership were maintained in the Municipality, but he had received a requisition from the Excise officials and he had deputed a Municipal Revenue

Inspector for making enquiry and on the basis of the report given by the Municipal Revenue Inspector he had given the certificate.

8. It is clear from the statement of this witness that he had no personal knowledge and there was no record available with the Municipality to show that the house that was searched by the Excise officials belonged to the accused. He had given a certificate on the basis of a report given to him by Municipal Revenue Inspector. Neither the Revenue Inspector was examined nor his report was brought before the Court.

9. P.W.6 is Excise Inspector. He stated that he received a case file from one Suryanarayana Reddy; after receipt of the Chemical Analysis Report the charge-sheet was filed by him. He stated that in quantitative estimation by the analyst margin could not be determined due to quantity of sample.

10. Then, there is a defence witness who stated that he was resident of Golivari street, Chirala and to the west of his house there was a house of Kurapati Veeramma. He stated that he did not know the accused but he had come to the Court at the request of the accused.

11. Witness No. I stated in his statement that Excise Inspector came to his house at 12.30 p.m. He is the only independent witness. From his house to the house of the accused it must have taken some time to reach but P.W.2 states in his statement that they were at the house of the accused at 12.15 p.m. In these circumstances, it becomes suspicious whether the panchanama was prepared after the search or before the search. All the witnesses stated that sample was taken from the whole contraband but P.W.1 states that the sample was taken from one of the packets and not whole of the quantity. Witness No. I also states that search was conducted by a Constable and in accordance with Section 42 of N.D.P.S. Act search can be conducted by an Officer who is superior in rank to a peon, sepoy or Constable. Therefore, it also becomes doubtful whether the search was conducted by the officers and not the constable. Then, Ex.P-5 is the requisition which was sent to the learned Sessions Judge by the Excise Inspector on 26-9-91, it had the stamp of Additional Sessions Judge on 26-9-91 but Ex.P-6 shows that the requisition and the sample was received by him through a letter dated 15-7-92. The letter of the Sessions Judge dated 15-7-92 was not part of the record. The requisition states under the column "particulars of the contraband seized":-

"(1) One paper packet with at about 110 grams of opium with (sealed)

(2) One sealed sample paper packet with 10 grams sealed with labels."

12. So, it is not clear from the requisition as to what was sent to the Chemical Analyst. If one goes by particulars of the contraband seized column, it appears that two packets were sent for analysis but only one packet was received by the Chemical Examiner which was weighing only about 9.285 grams. There was no packet sent weighing 9.285 grams. One packet had 10 grams and another packet

had weight of 110 grams. What happened to the packet contained 110 grams had not been explained. Even in the analysis report the Chemical Examiner stated that quantitative estimation of morphine could not be determined as the quantity of the sample was not sufficient and he opined that the sample was substandard opium.

13. While analysing the whole evidence it becomes difficult to sustain the conviction. Besides what has been pointed out herein above, there are other grounds on which this Court feels that it would not be safe to uphold the conviction. Section 17 of the N.D.P.S. Act lays down the punishment. Section 17 is reproduced:-

"17. Punishment for contravention in relation to prepared opium - Whoever, in contravention of any provision of this Act or any rule or order made or condition of licence granted thereunder manufactures, possesses, sells, purchases, transports, imports inter-State, exports inter- State or uses prepared opium shall be punishable with rigorous imprisonment for a term which shall not be less than ten years but which may extend to twenty years and shall also be liable to fine which shall not be less than one lakh rupees but which may extend to two lakh rupees;"

14. So, if any conviction is made under this section it has to be proved beyond doubt that the accused was in possession of the opium. In the present case, the evidence furnished by the prosecution does not at all prove the possession of the petitioner over the opium that was seized beyond reasonable doubt. It was doubtful whether the house was owned by the accused. Even if it is considered that the house belongs to the accused, it is again doubtful whether the wooden box was in the possession of the accused or not. One can visualise situations where number of members of a family are living in the same house and have possession of different articles and one member of the family being not aware of what is possessed by another member of the family in a separate room. It was not established by the prosecution that the accused alone was the possessor of the house and as such she is the possessor of the wooden box and eventually of what the box contained. The offence is a serious offence where the minimum punishment is of 10 years, therefore the prosecution's case must be beyond the slightest doubt. Only a certificate was produced from a Municipal Commissioner to establish the ownership of the house, that certificate also was not given by the Commissioner on the basis of any maintained record of the Municipality but only on the basis of investigation conducted by him through his subordinate after the crime was registered. The report furnished by that subordinate was not furnished to the Court nor was that Inspector examined. It has also come in evidence that the room in which the contraband was found was partitioned inside. Therefore, it becomes doubtful also whether the box and the material contained in the box was in the possession of the accused in terms of Section 17 of the N.D.P.S. Act, or not. The prosecution must also fail because the mandate of Section 42 of the N.D.P.S. Act has not been complied with. Section 42 lays down:-

"42. Power of entry, search, seizure and arrest without warrant or authorisation - (1) Any such Officer (being an officer superior in rank to a peon, sepoy or constable) of the departments of central excise, narcotics, customs, revenue intelligence or any other department of the Central Government or of the Border Security Force as is empowered in this behalf by general or special order by the Central Government, or any such officer (being an officer superior in rank to a peon, sepoy or constable) of the revenue, drugs control, excise, police or any other department of a State Government as is empowered in this behalf by general or special order of the State Government, if he has reason to believe from personal knowledge or information given by any person and taken down in writing, that any narcotic drug, or psychotropic substance, in respect of which an offence punishable under Chapter IV has been committed or any document or other article which may furnish evidence of the commission of such offence is kept or concealed in any building, conveyance or enclosed place, may between sunrise and sunset-

(a) enter into and search any such building, conveyance or place;

(b) in case of resistance, break open any door and remove any obstacle to such entry;

(c) seize such drug or substance and all materials used in the manufacture thereof and any other article and any animal or conveyance which he has reason to believe to be liable to confiscation under this Act and any document or other article which he has reason to believe may furnish evidence of the commission of any offence punishable under Chapter IV relating to such drug or substance; and

(d) detain and search, and, if he thinks proper, arrest any person whom he has reason to believe to have committed any offence punishable under Chapter IV relating to such drug or substance:

Provided that if such officer has reason to believe that a search warrant or authorisation cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place at any time between sunset and sunrise after recording the grounds of his belief."

15. According to this section, as far as State Government is concerned any officer (being an officer superior in rank to a peon, sepoy or constable) of the revenue, drugs control, excise, police or any other department who is empowered by general or specific order of the (sic) Government has the power of entry, search and seizure without warrant or authorisation. This section further requires that power u/s 42 can be exercised by an authorised officer if he has reason to believe that an offence punishable under Chapter IV has been committed. In case of information received from some other source not being personal knowledge there is further rider that it must be reduced to writing. These safeguards in Section 42 are mandatory and the facts of the present case reveal that the search was conducted on the basis of information received by the

Excise officials which was not reduced to writing, even the Inspector stated that he was not aware of the procedure to be followed under N.D.P.S. Act. Therefore, there has been a violation of Section 42. The prosecution also has not at any point of time stated that the Excise Inspector was an authorised Officer within the meaning of Section 42 of the Act. It is not sufficient to be an Inspector of Excise or an Officer of the Government above a certain rank to have the powers of entry, search, seizure and arrest without warrant but it is necessary for such officials that they must have been authorised by the Government either by a general order or by a special order. Neither in the statement of witnesses nor from the record of the case it has been shown that the witnesses who conducted the search, arrested the accused were authorised by the State Government in terms of Section 42 of the N.D.P.S. Act.

16. For the foregoing reasons, this appeal is allowed. Conviction and sentence are set aside. The accused-appellant is acquitted. He is directed to be set free immediately. No costs.