

(1996) 12 AP CK 0060

In the Andhra Pradesh High Court

Case No : Criminal Appeal No. 769 of 1994

Sivaratri Venkataiah and Others

APPELLANT

Vs

State of Andhra Pradesh

RESPONDENT

Date of Decision : 10-12-1996

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 20, 41, 42, 43, 50

Citation : (1997) 1 ALD(Cri) 354 : (1997) 1 ALT(Cri) 155 : (1997) CriLJ 1967

Hon'ble Judges : Motilal B. Naik, J

Bench : Single Bench

Advocate : C. Padmanabham Reddy, for C. Damodar Reddy, for the Appellant;
Public Prosecutor, for the Respondent

Judgement

1. This appeal is directed against the judgment in NDPS Sessions Case No. 51/94 (CC No. 1/94) convicting the appellants u/s 8(c) r/w Section 20(b)(i) of the N.D.P.S. Act and sentencing them to undergo imprisonment for a period of five years each besides imposing fine of Rs. 1000/- each, in default to suffer S.I. for six months.

2. The prosecution laid charge against A-1 to A-3 alleging that the accused Nos. 1 to 3 on the intervening night of 5/6th August, 1993 around 2-10 hours in the general bogi of 6060 Charminar Express, found in possession of Ganja without licence. While it was halting at Platform No. 1A in Vijayawada Railway Station, A-1 was found in possession of 10 Kgs. of Ganja in light blue coloured century sports bag and A-2 was found in possession of 12 1/2 Kgs of Ganja in one grey coloured Alfa suitcase having English letters NK and A-3 was found in possession of 7 1/2 Kgs. of Ganja in a head-load cloth packing, without having any valid licence, thereby the accused have committed an offence punishable under Section 8(c) r/w Section 20(b)(i) of the N.D.P.S. Act.

3. The case of the prosecution is that the accused who are appellants herein are

all residents of Warangal and close associates. A-1 is working as Police Constable in Chennaraopet Police Station, of Warangal District. A-2 is working as A. R. Police Constable and A-3 is their close associate. All the accused wanted to earn easy money illegally. On the intervening night of 5/6th of August, 1993 around 2-10 hours, the Inspector of Police who is examined as PW-3 Vijayawada, noticed three accused in general bogi No. 6060 of Charminar Express at Vijayawada Railway Station moving in a suspicious circumstances and he made them to get down along with their luggage and opened their luggage in the presence of mediators PW-1 and PW-2 who are coffee vendors on the platform and found Ganja in paper packets. On interrogation, it is revealed that they purchased the Ganja from one Chandraiah of Narsannapeta at Rs. 150/- per Kg and were proceeding to Madras to sell the same at Rs. 600/- per Kg. A-1 was found carrying 10 Kgs., A-2 was found carrying 12 1/2 Kgs. and A-3 was found 7 1/2 Kgs. of Ganja. The Inspector of Railway Police seized the ganja worth Rs. 18,000/- under the cover of police proceedings and registered the same as FIR and sent the accused for remand and investigated into the case. The report of the Chemical Examiner revealed that the seized material was ganja.

4. In order to sustain the case of the prosecution, the prosecution in all examined three witnessed, PW-1 and PW-2 are the mediators to the proceeding who are no other than the coffee vendors. PW-3 is the Inspector of Railway Police who seized the ganja and got marked Mos 1 to 8. On the basis of the oral and documentary evidence, the accused were examined u/s 313, Cr.P.C. with regard to the incriminating material against them in the evidence of the prosecution witnesses. All the accused denied the evidence of the prosecution and stated that they have nothing to do with the case and they had gone to Vijayawada for Darshan of Goddess Kanaka Durga.

5. On the basis of the evidence, the trial Court held that all the appellants-accused are guilty of committing the offence punishable u/s 8(c) r/w Section 20(b)(i) of the N.D.P.S. Act and convicted them to undergo R.I. for a period of 5 years each and also to pay a fine of Rs. 1000/- each, in default to undergo SI for six months against which the present appeal is filed by the accused.

6. Sri C. Padmanabha Reddy, learned senior counsel appearing for the accused has made a preliminary submission on the question of requirement contemplated u/s 50 of the NDPS Act not being complied with by PW-3 who is to secure the presence of a Gazetted Officer before search of the persons. The learned counsel stated that either in the evidence of PW-3 who is the Inspector of Police, Railways or through any evidence, the prosecution has brought out the fact of accused being searched in the presence of a Gazetted Officer nor being informed about their right to be searched before the Gazetted Officer. In the absence of such evidence being adduced by the prosecution, the conviction on the appellants cannot be sustained as held by the Supreme Court in Saiyad Mohd. Saiyad Umar Saiyad and Others Vs. State of Gujarat, . The learned counsel relying on the above decision stated that the requirement contemplated u/s 50 is

a mandatory and any violation thereof is fatal to the case of the prosecution and, therefore, the appellants are entitled for acquittal.

7. In the light of the submission made by the learned counsel it is necessary for this Court to examine whether the requirement contemplated u/s 50 of the Act is mandatory which has the effect of nullifying the prosecution case in the event of the requirement is not complied with. The requirement as provided u/s 50 reads as follows :-

"(1) When any officer duly authorised u/s 42 is about to search any person under the provisions of Sections 41 and 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 department 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 before the gazetted officer or the Magistrate referred to in sub-section (1).

(3) The gazetted officer or Magistrate before whom any such person is brought shall if he sees no reasonable ground for search, forthwith discharge a person but otherwise shall direct that search be made.

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

8. For the purpose of present case, the requirement under sub-section (1) of Section 50 of the Act is to be examined which says that the officer so authorised should make a search on the person if such person so requires he shall take the person without unnecessary delay to the nearest gazetted officer of any department or to any Magistrate. The requirement contemplated under sub-section (1) of Section 50 particularly with reference to "if such person so requires" has been interpreted by the Supreme Court in the above decision by holding that whether the said person seeks or fail to seek the assistance, he shall be produced before the gazetted officer or a Magistrate. It shall be the duty of the authorised officer to take the person concerned, for purpose of search, to the Gazetted Officer or seek the presence of the gazetted officer before they are being searched on the allegation of possessing the narcotic drugs. Applying the text laid down by the apex Court to the case on hand, as discussed above, the prosecutions has not indicated through the evidence or either PW-3 or any other evidence to show that the accused-appellants were produced before the gazetted officer or the presence of the gazetted officer was sought for purpose of searching them on the allegation of possessing narcotic drugs. In view of non-compliance of the mandatory requirement contemplated under sub-section (1) of Section 50, I am inclined to say that the conviction and sentence ordered by the trial Court, on the basis of the evidence let in by the prosecution cannot be sustained.

9. Accordingly the appeal is allowed and the conviction and sentence ordered by the trial Court are set aside. Since I have acquitted the accused-appellants, the

fine amount which they have deposited, shall be refunded to them. The bail bonds of the accused shall stand cancelled.

10. Appeal allowed.