
(1986) 07 SHI CK 0010
In the High Court Of Himachal Pradesh

Smt. Prem Latta	Vs	APPELLANT
State of Himachal Pradesh		RESPONDENT

Date of Decision : 04-07-1986

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 100(4), 100(5)
Punjab Excise Act, 1914 — Section 61(1)(q)

Citation : (1987) CriLJ 1539 : (1987) 2 RCR(Criminal) 596 : (1986) ShimLC 258

Hon'ble Judges : V.P. Bhatnagar, J

Bench : Single Bench

Judgement

V.P. Bhatnagar, J.—The effect of non-compliance of the provisions of sub-section (4) of Section 100, Cr. P.C. falls for determination in this criminal revision.

2. The prosecution case is that Police Head Constable Shri Bhagwan Singh (PW-3) was investigating a case at village Ghungar, in Police Station Palampur on April 24, 1983 when he received a secret information that Prem Lata was in possession of illicit liquor and Lahan. Thereupon, he constituted a raiding party consisting of Excise Inspector Arjun Singh (PW-2), Shri Gopi Chand (PW-1) and Shri Mohinder Singh. This party conducted search of Prem Lata's house and recovered one tin containing 5 kgs. of Lahan. The Excise Inspector tested the contents of the tin and found that Lahan contained therein was fit for distillation. This ultimately resulted in the filing of a challan and the conviction of the accused u/s 61(l)(q) of the Punjab Excise Act as applicable to the State of Himachal Pradesh.

3. It stands clearly established from the prosecution evidence itself that Shri Gopi Chand examined as PW-1 and Shri Mohinder Singh, who was given up as an unnecessary witness at the time of recording the prosecution evidence, were employed in the Home Guards and were further detailed on duty of Police Station Palampur on the day the raid was conducted, It has, therefore, been rightly held by the learned Additional Sessions Judge that these witnesses could not be categorised as "Independent and respectable inhabitants of the locality in which

the place to be searched is situate" within the ambit of sub-section (4) of Section 100 of the Criminal Procedure Code. The Courts below, however, concluded from the testimony of Shri Gopi Chand (PW-1), Excise Inspector Arjun Singh (PW-2) and H.C. Bhagwan Singh (PW-3) that the prosecution had succeeded in bringing guilt home to the accused.

4. On the facts of this case, it appears to me that the failure of the prosecution in associating two or more independent and respectable witnesses renders this case doubtful, benefit of which must go to the accused. The above conclusion is based on the interpretation of subjections (4), (5) and (8) of Section 100 Cr. P.C. The said sub- sections read as follows : - "100. Persons in charge of closed place to search : ?

(1)...

(2)...

(3)...

(4) Before making a search under this chapter, the officer or other person about to make it shall call upon two or more independent and respectable inhabitants of the locality in which the place to be searched is situate or of any other locality if no such inhabitant of the said locality is available or is willing to be a witness to the search, to attend and witness the search and may issue an order in writing to them or any of them so to do.

(5) The search shall be made in their presence, and a list of all things seized in the course of such search and of the place in which they are respectively found shall be prepared by such officer or other person and signed by such witnesses; but no person witnessing a search under this section shall be required to attend the Court as a witness of the search unless specially summoned by it.

(6)...

(7)...

(8) Any person who, without reasonable cause, refuses or neglects to attend and witness a search under this section, when called upon to do so by an order in writing delivered or tendered to him shall be deemed to have committed an offence u/s 187 of the Indian Penal Code (45 of 1860).

The bare perusal of subjections (4), (5) and (8) of Section 100, Cr. P.C. makes it abundantly clear that a duty has been cast upon the officer or any other person conducting search to make every effort to do so in presence of two or more independent and respectable inhabitants of the locality in which the place to be searched is situate. If no such inhabitant is available or is willing to be witness to the search, a witness of any other locality has to be called upon to join the raiding party for witnessing the search. These provisions are quite stringent and meant to be strictly followed inasmuch as the refusal or neglect to attend and witness a search when called upon to do so by an order in writing has been

expressly made an offence u/s 187 of the Indian Penal Code.

5. All the same, failure to comply with the aforesaid provisions will not be invariably fatal to the prosecution. This is because circumstances of a particular case may be such as to make it totally unreasonable and impracticable, if not impossible, to procure the presence of such witness. The possibility of existence of such circumstances has been noticed by the Supreme Court in *State of Maharashtra Vs. P.K. Pathak*, wherein the smuggled articles were recovered by the Custom Authorities from Teney at the seashore and also from the bushes on an island where they were hidden and which had to be reached through a mechanized vessel, the journey itself taking an hour and a half. Nevertheless, it would be for the prosecution to establish on the facts and circumstances of each case that meeting the requirements of Section 100 Cr. P.C. pertaining to the association of two or more independent and respectable witnesses with the conducting of search was not possible. If the prosecution fails to discharge this onus, its case would be rendered shaky and, on the face of it, unworthy of acceptance unless a formidable set of reasons are shown to exist justifying the infraction of express provisions of law contained in Section 100, *ibid*. Thus, the Courts will be extremely reluctant to uphold the prosecution case which is solely based on recovery made as a result of a search not witnessed by at least two independent and respectable persons, unless it was unreasonable and impracticable to procure the presence of such witnesses.

6. In the instant case, the prosecution evidence per se clearly indicates that independent respectable persons were easily available in the locality. In fact, there is no escape from the conclusion that H. C. Bhagwan Singh (PW-3) made no efforts at all to call upon such persons for being witness to the search. He has admitted in his cross-examination about the presence of a number of persons as well as that of seven or eight shops at the place where he associated Shri Gopi Chand (PW-1) in the raiding party. Gopi Chand was admittedly posted at the police Station, Palampur, on that date and it is not very convincing that the meeting between two of them took place in the manner deposed to by H. C. Bhagwan Singh. Be that as it may, one thing which stands out like a sore thumb is the flagrant violation of law, as discussed above. After all why the Police Officers or other persons placed in such a situation should shirk to implement and comply with the express provisions of law laid down by the Legislature? In these circumstances, the entire prosecution case becomes somewhat fishy and unfit to be acted upon. In other words, non compliance of law discussed above would give rise to doubt about the accuracy of the prosecution case, and the benefit of this doubt has to be given to the accused.

7. In view of the above observations, this revision petition is accepted and the order of conviction against the petitioner-accused set aside. The bail bonds of the petitioner are discharged.