

(2012) 03 MP CK 0123

In the Madhya Pradesh High Court

Case No : Miscellaneous Criminal Case No. 952 of 2012

State of Madhya Pradesh

APPELLANT

Vs

Kanhaiyalal and Another

RESPONDENT

Date of Decision : 28-03-2012

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313, 378(3)

Evidence Act, 1872 — Section 27

Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 29, 41(2), 42, 50, 55

Citation : (2012) 03 MP CK 0123

Hon'ble Judges : Mool Chand Garg, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Hon"ble Shri Justice M.C. Garg, J.—This application seeking leave to file an appeal u/s 378(3) Cr.P.C. has been filed by the State of Madhya Pradesh against the impugned judgment passed by the Special Judge, (Narcotic Drugs and Psychotropic Substances) district Shajapur, M.P. in S.T. No. 1/11 dated November 11, 2011, whereby the Special Judge has been pleased to acquit the respondents of the charges framed against them u/s 8(c)(d) read with Section 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the "Act"). It is the case of the prosecution that on receipt of secret information, entry was made in Roznamcha regarding possession of illegal opium by the two accused persons. Thereafter, accused Kanhaiyalal was apprehended and from his possession 8.150 Kgs of opium were found, who was carrying the same without any licence. On his disclosure u/s 27 of the Evidence Act, the other co-accused namely Ramlal was also arrested. At the time of conducting the raid, apprehending Kanhaiylal, his search was taken after following the provisions of Section 50 of the Act. The seized articles were then taken into possession by preparing Panchnamas. Two samples were also drawn which were also taken into possession vide separate panchnama. Those articles were then sent to the

concerned police station. Statement of witnesses were recorded.

2. After completing the investigation, challan was filed against both the accused persons against whom charges were framed. In so far as accused Kanhaiyalal is concerned, charges were framed u/s 8(c) and (d) of the Act, whereas against accused Ramlal charges were framed u/s 8(c) read with Section 29 of the Act. In support of their case, prosecution examined Shri R.L. Bhawar PW-21, Assistant Sub Inspector, who deposed as per the case of prosecution. Another witness Shiv Prakash Sharma was examined as PW-24, who supported the version of PW-21. Other witnesses were also examined. In the statement u/s 313 Cr.P.C. accused Kanhaiyalal denied his association with Ramlal in having purchased opium from him. Accused Ramlal denied his involvement in the crime and took a defence that he had been falsely implicated. The two public witnesses Santosh and Naryansingh while admitting their signatures on the panchnama regarding seizure of opium and samples drawn from denied the contents thereof. They were declared hostile.

3. By the impugned judgment, the trial Court has acquitted respondent-Ramlal for the reason that the prosecution has not been able to bring on record any evidence which may prove his involvement in the case except for the statement of the co-accused Kanhaiyalal u/s 27 of the Evidence Act. It is well settled that such disclosure without their being any evidence to corroborate the crime for which the accused has been charged with by the prosecution would not prove the case in so far as that person is concerned. It is not in dispute that except for the statement of the co-accused, u/s 27 of the Evidence Act, there is no other evidence collected by the prosecution against him. In so far as accused Kanhaiyalal is concerned, the trial Court has found that the prosecution has not been able to prove that the rights available to him under the Act of having himself searched u/s 50 of the Act was not proved by the prosecution, in as much as, the memorandum prepared u/s 50 does not show that the notice Ex.P-3 was read-over to accused Kanhaiyalal informing him that Kanhaiyalal had legal right to get searched before a Magistrate or a Gazetted Officer. Moreover, even though as per the case of the prosecution, a panchnama was prepared by taking Zama Talashi of accused Kahaiyalal, when sum of Rs. 269/- was found in his possession and a Panchnama was prepared, but neither the copy of the Panchnama regarding receipt of Rs. 269/- from the accused nor the said amount was produced by the prosecution.

4. The trial Judge also found that there was also violation of Section 55 of the Act in as much as the samples were not re-sealed with the seal of the person, who took care of them, before depositing the same in the concerned police station. Section 55 of the Act reads as under:

55. Police to take charge of articles seized and delivered. -An officer-in-charge of a police station shall take charge of and keep in safe custody, pending the orders of the Magistrate, all articles seized under this Act within the local area of that police station and which may be delivered to him, and shall allow any officer who

may accompany such articles to the police station or who may be deputed for the purpose, to affix his seal to such articles or to take samples of and from them and all samples so taken shall also be sealed with a seal of the officer-in-charge of the police station.

5. The trial Judge has found that the alleged seized articles when were brought to the Police Station were not re-sealed by competent officer. This was so found in the statement of PW-10 Upmanyu Saxena. The relevant observations in paragraph 44 and 45 of the impugned judgment are reproduced hereunder:

6. On the basis of the infirmities in the case of the prosecution, i.e. non-compliance of statutory provisions under Sections 50 and 55 of the Act and there being no evidence available on record to corroborate the involvement of accused Ramlal except for the statement of the co-accused u/s 27 of the Evidence Act, the trial Judge acquitted the two accused persons.

7. According to the learned counsel for the applicant, the impugned judgment suffer from error of appreciation of evidence as also in law. It is submitted that the trial Judge has failed to appreciate that the opium mentioning 8.150 Kgs was seized illegally from the custody of both the accused persons and both of them had been doing business of selling opium illegally together. It was also submitted that there was no reason to rely upon the statement of the police witnesses. Moreover, recovery of mobile has not at all been taken into consideration by the trial Judge. It is submitted that even if independent witnesses have not supported the case of prosecution, the document prepared by the prosecution (Ex.P-1 to Ex.P-16) bears their signatures and this alone would prove the case of prosecution, but this aspect has been simply ignored by the trial Judge.

8. As observed earlier, when there was a violation of provisions of Section 50 and 55 of the Act in completing the process of investigation there was no evidence to prove the involvement of accused Ramlal in the alleged crime except for the statement of the co-accused u/s 27 of the Evidence Act. It is apparent that prosecution has neither proved their case of having seized 8.150 Kgs of opium from accused Kanhaiyalal or involvement of Ramlal as a conspirator in such a crime with Kanhaiyalal. No infirmity can be found in the judgment of the trial Judge.

9. It is well settled that non-compliance of Section 50 of the Act is fatal to the case of the prosecution. In this case, search was conducted after receiving advance information and therefore it was necessary for the prosecution to comply with the provisions of Section 50 of the Act. Reference can be made to a judgment of Hon"ble the Supreme Court in the case of State of Punjab Vs. Balbir Singh, The relevant portion is reproduced hereunder:

26. The questions considered above arise frequently before the trial courts. Therefore we find it necessary to set out our conclusions which are as follows:

(5) On prior information, the empowered officer or authorised officer while acting

under Sections 41(2) or 42 should comply with the provisions of Section 50 before the search of the person is made and such person should be informed that if he so requires, he shall be produced before a gazetted officer or a magistrate as provided thereunder. It is obligatory on the part of such officer to inform the person to be searched. Failure to inform the person to be searched and if such person so requires, failure to take him to the gazetted officer or the magistrate, would amount to non-compliance of Section 50 which is mandatory and thus it would affect the prosecution case and vitiate the trial. After being so informed whether such person opted for such a course or not would be a question of fact.

10. In so far as provisions u/s 55 of the Act are concerned, they are also mandatory in nature. Violation of provision u/s 55 also vitiates the trial.

11. It is well settled that if two views are possible, the view which supports the version of the accused has to be relied upon. Hence, I find no infirmity in the judgment of the trial Judge. Consequently, the application seeking leave to file an appeal against the impugned judgment is dismissed. C.C. as per rules.