
(2009) 07 AP CK 0083

In the Andhra Pradesh High Court

Case No : Criminal Appeal No. 534 of 2004

T. Rambabu @ Bulli and Another

APPELLANT

Vs

The State of A.P.

RESPONDENT

Date of Decision : 31-07-2009

Acts Referred:

Arms Act, 1959 — Section 27

Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 20, 50, 8

Citation : (2010) 1 ALD(Cri) 84 : (2010) CriLJ 1149 : (2010) 7 RCR(Criminal) 531

Hon'ble Judges : R. Kantha Rao, J

Bench : Single Bench

Advocate : K. Srinivas, for the Appellant; Public Prosecutur, for the Respondent

Final Decision : Dismissed

Judgement

R. Kantha Rao, J.—This appeal is directed against the judgment, dated 19.03.2004 passed by the I Additional Sessions Judge, Guntur in S.C. No. 15 of 2001 whereby and whereunder the appellants were convicted for the offence u/s 8(c) r/w 20(b)(i) of the Narcotic Drugs and Psychotropic Substances Act and sentenced to undergo rigorous imprisonment for a period of six months each and also to pay a fine of Rs. 5,000/- each and A-1 was further convicted for the offence u/s 27 of the Arms Act and sentenced to undergo rigorous imprisonment for a period of three years and also to pay a fine of Rs. 1,000/-.

2. It was the case of the prosecution that on 25.12.2000 at about 7.00 p.m. while PW-2, the Inspector of Police, Sathenapally, PW-3, the Sub-Inspector of Police, Sathenapally Town Police Station, PW-1, a police constable, Sathenapally Town Police Station and some other police personnel were proceeding in a police jeep towards Medikonduru, they noticed the appellants near the agricultural market yard, Sattenapally. The appellants on seeing the police party tried to escape, but some members of the police party chased and caught hold of the appellants and they were produced before the Inspector of Police and on their

search, two packets of ganja, 25 grams each was found in possession of the appellants. The Inspector of Police got drafted the police proceedings after explaining the reasons for their arrest and instructed the Sub-Inspector of Police to register a case and investigate into the matter. On his instructions and basing on the police proceedings, PW-3, the S.I. of Police registered a case in Crime No. 254 of 2000 for the offence u/s 8(c) r/w 20(b) of NDPS Act and Section 27 of the Arms Act on the ground that the appellants were in possession of two packets of ganja each containing 250 grams and also that the first appellant was in possession of a knife. PW-3 drew samples from ganja packets, forwarded them to Chemical Examiner, Regional Prohibition and Excise Laboratory, Guntur. The report received from the, chemical examiner revealed that the samples are ganja. On completing investigation, PW-3 filed the charge-sheet against the appellants.

3. In the course of the trial before the learned I Additional Sessions Judge, Guntur, the prosecution in order to prove the guilt of the accused examined PWs.1 to 3, marked Exs.P-1 to P-5 and M.Os.1 to 5. The entire case of the prosecution rested on the evidence of police witnesses and the case was registered basing on the police proceedings got prepared by PW-2, the Inspector of Police, after the alleged apprehension of the appellants while they were said to be in possession of ganja. All the three witnesses of course have spoken to the fact of arresting appellants and seizing ganja weighing about 250 grams from each of them.

4. The learned Court below upon considering the evidence on record convicted the appellants for the offence under Sections 8(c) r/w 20(b)(i) of the NDPS Act and Section 27 of the Arms Act.

5. The said order of conviction and sentence is the subject-matter of the challenge in this appeal.

6. The learned Counsel appealing for the appellants would submit that the trial Court erred in placing reliance on the evidence of PWs. 1 to 3 which is highly discrepant on material aspects and also ignoring the fact that all the witnesses are police witnesses. He would further submit that despite the noncompliance of the mandatory provisions u/s 50 of the NDPS Act by the police officials, the trial Court convicted the appellants and also overlooked the fact that no attempt was made by the arresting police officer to secure the presence of mediators at the time of the alleged search and seizure of the ganja from the appellants. Thus, according to the learned counsel, the conviction and sentence passed by the trial Court being unsustainable are liable to be set aside in this appeal.

7. On the other hand, the learned Public Prosecutor appearing for the State would contend that there is no legal bar to rest a conviction basing on the testimony of police witnesses and therefore, the trial Court rightly convicted the appellants and the same shall be affirmed in this appeal.

8. Now the point for determination in this appeal is whether the order of

conviction and sentence passed by the learned trial Court can be sustained?

9. There is no dispute about the proposition that a conviction can be based on the testimony of police witnesses even though no independent witnesses were examined on behalf of the prosecution. However, whether the evidence of police witnesses warrants conviction or not depends upon the facts and circumstances of each case. If really, the circumstances indicate that it was not possible for the arresting police officer to secure the mediators at a given time, the Court cannot find fault with the arresting police officer in not securing the mediators. However, when there is ample opportunity for the police officer to secure the presence of mediators and he fails to do so, it can be considered as a lapse on the part of the investigating agency. In the instant case, the appellants were arrested in a busy locality and on the Christmas day. The evidence of PWs.1 to 3 clearly indicates that no effort was made by PW-2 to secure any mediators. PW-1, the police constable stated in his evidence that at the time of arrest of the appellants there were no mediators at all with them and they did not search for any mediators. Whereas PW-2, the Inspector of Police stated in his evidence stated that they tried to secure the mediators but nobody was available. The evidence of PW-3, the Sub-Inspector of Police also indicates that no attempt was made to secure the mediators and he specifically stated that he did not personally go to the bus stand to search for the mediators. Thus, even though there was ample opportunity for PW-2 to secure mediators with the help of police personnel who followed him, he did not make any attempt to secure the presence of the mediators and under these circumstances, it is quite unsafe to place reliance on the evidence of PWs. 1 to 3 who are the police witnesses and more particularly, when PW-1 specifically stated in his chief-examination itself that there were no mediators with them at all and they also did not search for any mediators.

10. Section 50 of the NDPS Act mandates that the authorized officer, before proceeding to search the person of the accused, shall inform the accused about his right of being searched before the nearest gazetted officer or the nearest magistrate. In the instant case, in the cross-examination PW-2 stated that even though the appellants were informed of their right to be searched before the gazetted officer, they did not avail the option, the said fact was not mentioned in the police proceedings. PW-2 stated only in his evidence in the cross-examination that he asked the appellants whether they want the search to be conducted in the presence of gazetted officer, they replied that they did not want the presence of any gazetted officer and the search can be conducted in the presence of PW-2.

11. In State of Haryana Vs. Vikram Singh, the Apex Court dealing with a case where there was no evidence to show that the accused was offered the option of the search in the presence either of the gazetted officer or magistrate, and the mediator examined was found to be stock witness held that the acquittal passed by the High Court cannot be interfered. Similarly, in Kalayath Nassar Vs. State of Kerala, the Apex Court held that if the accused was not informed of his right to be searched before the gazetted officer or magistrate, prejudice is caused to the

accused for non-compliance of Section 50 of the NDPS Act, thereby the search is vitiated. The Apex Court further held that the fact that the accused did not make a request on his own does not dispense with the requirement of compliance of Section 50. In *State of Punjab v. Om Prakash* 1997 Cri LJ 4611 the Division Bench of Punjab and Haryana High Court held that in case of search of the person of the accused, the authorized officer is under a duty to inform the accused of his right to be searched before the magistrate or a gazetted officer, the same cannot be avoided by stating in defence that the accused declined the offer, and in such case, the absence of independent witnesses is fatal for prosecution.

12. In the instant case, except the self serving statement of PW-2, there is no material on record to show that in fact, the appellants were informed of their right of being searched in the presence of gazetted officer or magistrate. In view of the decision of the Division Bench of Punjab and Haryana High Court 3rd referred above, PW-2 cannot avoid to take the appellants before the gazetted officer or the magistrate for the purpose of conducting search on the pretext that the appellants declined to avail their option. In the instant case also, there are no independent witnesses and therefore, it is not safe to act on the testimony of PWs. 1 to 3 who are the police witnesses. The appellants even though were arrested on 25.12.2000 at 7 p.m., immediately thereafter, a case was registered against them in Sattenapalli Town police station by PW-2, the Sub-Inspector of Police. But, PW-3 stated in his cross-examination that the police station is at a distance of 150 yards from the Court and the F.I.R. was sent through the court constable. He also admitted that as per the endorsement of the magistrate, Ex.P-2 F.I.R. was received by him on 26.12.2000 at 3 p.m. The inordinate delay in reaching the F.I.R. to the magistrate is also not at all explained by the prosecution.

13. Under these circumstances, the entire version of PWs.1 to 3 becomes suspect and their version cannot be believed in respect of the arrest of the appellants at relevant time as well as the seizure of ganja made by them from the possession of the appellants. The learned trial Court misdirected itself to the evidence of the witnesses, and also in regard to the mandatory provisions relating to the search and seizure indicated in Section 50 of NDPS Act. The entire testimony of PWs.1 to 3 being rejected as undependable it is needless to mention that the conviction recorded by the trial Court against A-1 for the offence u/s 27 of the Arms Act also can not be sustained.

14. For all the reasons stated above, the conviction and sentence passed by the trial Court against the appellants is liable to be set aside and accordingly the same is set aside. The fine amount, if any, paid by the appellants shall be refunded to them. The appeal is allowed.