

Madras High Court

Balasundaran vs State on 13 July, 1999

Equivalent citations: 2000 (67) ECC 30, 1999 (113) ELT 785 Mad

Author: A Ramamurthi

Bench: A Ramamurthi

JUDGMENT A. Ramamurthi, J.

1. Appellants are accused Nos. 1 to 4 in C.C. No. 22 of 1996 on the file of the Special Judge, N.D.P.S. Act, Chennai and they were found guilty under Section 8(c) read with 21 of N.D.P.S. Act, convicted and sentenced to undergo R.I. for ten years each and to pay a fine of Rs. 1,00,000/-each in default to undergo R.I. for two years each. The sentence already undergone is set off under Section 428 Cr. P.C. The second accused has preferred C.A. No. 314 of 1997, the third accused has preferred C.A. No. 288 of 1997 and the first and the fourth accused have preferred C.A. No. 526 of 1997, aggrieved against the same judgment of conviction dated 31-5-1997.

2. The case in brief is as follows : -

The Inspector of Police, N.I.B. C.I.D., Chennai has laid the charge sheet against these accused stating that on 3-11-1995 at 16.30 hours near the main entrance of Thiruvalluvar Bus Transport Corporation bus stand, Parrys, Chennai, AI was found in possession of 2 kgs. of heroin and the other accused were each found in possession of 1 kg. of heroin without any valid licence or permit and committed an offence punishable under Section 8(c) read with 21 of N.D.P.S. Act. P.W. 5 Baskaran was working as Inspector of Police, N.I.B. C.I.D., Chennai. On 3-11-1995, he received an information Ex. P4 from the Superintendent of Police and according to the information he went along with P.W. 3, the Sub-Inspector of Police and P.W. 4, the Head Constable and his police party went to the main gate of Thiruvalluvar bus stand and watched the accused. He intercepted the accused. In the presence of P.W. 1 and one Srinivasan. He informed them about the right to be searched before the nearest Judicial Magistrate or Gazetted Officer. AI knew only Telegu and as such P.W. 4 Muthu narrated the information in telegu and got the answer. Ex. P5 to P8 were the notices given to all the accused. He also searched the first accused and found him in possession of heroin in a polythene cover put in a cloth bag kept into a suit case. Similarly the other accused were found in possession of 1 kg. of heroin each. He took ten samples of heroin in each one kg. bundle. The samples and the contraband were seized under a cover of mahazar Ex. P9. He arrested all the accused and recorded their statements. They were brought along with the contraband to the station and a case was also registered against them. Ex. P10 is the First Information Report. He examined all the accused and recorded their statements. They were brought along with the contraband to the station and a case was also registered against them. Ex. P10 is the First Information Report. He examined all the witnesses and sent a report to the Superior Officer under Section 57 of N.D.P.S. Act.

3. P.W. 2 Thiru Sankar has received a requisition letter Ex. P2 from the Court along with five samples and on analysis, it was found that it contained Dy-Acetylene Morphine. Ex. P3 is the report sent by him, after completing investigation, Thiru Hanif, Inspector of Police, laid the charge sheet against all the accused. M.Os. 7, 8, 11, 13 were the bags carried by the four accused. P.W. 1 did not support the prosecution case and turned hostile.

4. On behalf of the prosecution, P.Ws. 1 to 5 were examined and Ex. P1 to P11 were marked. M.Os. 1 to 14 series were produced. Accused were also examined under Section 313 Cr.P.C and they denied the offence. No witness was examined on the side of the accused. Learned Judge on the basis of the material and after hearing both sides, gave a finding that the accused are guilty under Section 8(c) read with 21 of N.D.P.S. Act, convicted and sentence them as aforesaid. Aggrieved against this, these three appeals are filed. Since all these appeals arise out of one judgment, a common judgment is pronounced in these appeals. The parties, hereinafter referred to as they are described in the Trial Court.

5. Learned Counsel for the appellants contended that evidence on record would prove that the alleged occurrence could not have taken place as stated by the prosecution. There are material contradictions and variation in the evidence of P.Ws 3 to 5. There is no independent evidence to substantiate the case of prosecution. The prosecution has deliberately failed to examine the other mahazar witnesses although P.W. 1 turned hostile. Ex. P5 to P9 run about 12 pages were shown to have written at the same time namely 4.30 p.m. which is humanly not possible. These documents could not have been written in the P.T.C. bus stand due to heavy rain as can be seen from the report dated 13-1-1997 on Indian Meteorological Department. These exhibits could have been written in the office is only the presumption of the learned Judge and there is absolutely no evidence to arrive at such a conclusion. The Court below failed to see that even from the evidence of P.W. 4, the appellants gave consent for search before the Judicial Magistrate or the Gazetted Officer, but they were not taken before the Authorities and as such there is violation of Section 50 of N.D.P.S. Act. P.W. 5 Inspector of Police himself has conducted search and as he was the Investigating Officer, it is fatal to the case of prosecution.

6. Learned Addl. Public Prosecutor stated that the Court below was justified in convicting the appellants based on the evidence of P.Ws. 3 to 5. Simply because they are police officials, their evidence cannot be thrown out on that ground. There is no reason to reject the testimony and there is corroboration in material particulars. The mandatory provisions under Sections 50 and 57 of N.D.P.S. Act have also been duly complied with. The non-examination of other mahazar witness was also explained by the prosecution. There is only a minor contradiction in the evidence of P.Ws. 3 and 4 and it would not affect the case of prosecution. The sample was also sent to the expert for analysis and the analyst also sent the report that the sample also contained dy-acetylene morphine. There is absolutely no motive for P.Ws. 3 to 5 to implicate the appellants in a grave crime.

7. Heard, learned Counsel for the appellants as well as the learned Addl. Public Prosecutor.

8. It is the case of the prosecution that on 3-11-1995 at about 16.30 hours near the main entrance of Thiruvalluvar bus stand, Parrys, Chennai, first accused was found in possession of 2 kgs of heroin and the other accused each found in possession of 1 kg. of heroin without valid licence or permit. P.Ws. 3 to 5 are the witnesses to speak about the occurrence. P.W. 3 is the Sub-Inspector of Police, P.W. 4 is the Head Constable and P. W. 5 is the Inspector of Police. Only on information, P.Ws. 3 to 5 went to the said place and waited for the accused and later on their arrival, P.W. 5 is said to have informed the accused about the right to be searched before the nearest Judicial Magistrate or the Gazetted Officer.

9. Learned Counsel for the appellants mainly contended that the mandatory provisions under Section 50 of N.D.P.S. Act have not been adhered to. They pointed out the discrepancy in the evidence of P.W. 4 with the evidence of P.Ws. 3 and 5. It has come out in the evidence that the first accused knew Telegu only and he did not know either Tamil or English. The notices said to have been served on the accused are marked as Ex.P5 to P9 in the case. P.W. 5 alone had informed these accused about their search either before the Judicial Magistrate or the Gazetted Officer. P.Ws. 3 and 5 stated in the course of evidence that the appellants stated that it is not necessary to be done before the Judicial Magistrate or the Gazetted Officer and the Inspector of Police himself can search them. However, P. W. 4 stated that when the question was put to the appellants, they have expressed their willingness. This material contradiction would only go to show that the occurrence as alleged by the prosecution could not have taken place. According to P.W. 4 they have expressed their desire to be searched before the Judicial Magistrate or the Gazetted Officer. The evidence of P.W. 3 and 5 are contrary to the above said version. P.W. 3 in the first instance stated that he did not write the information given to the appellants and the same was written only by P.W. 5. Later he stated that on the dictation of P.W. 5 only he wrote the answers given by the appellants. P.W. 4 on the other hand stated that the answers given by the appellants were recorded by P.W. 5 and he obtained the signatures. The aforesaid discrepancy in the evidence of P.Ws. 3 and 5 go a long way to show that their evidence cannot be safely accepted and acted upon.

10. P.W. 1 has been examined as a mahazar witness to prove the recovery of contraband from these appellants. P.W. 1 turned hostile and did not support the prosecution. It has come out in evidence that steps were taken to secure the presence of other witness namely Srinivasan but the address given by him is a bogus one and as such he could not be secured. According to the prosecution, the occurrence took place at about 4.30. p.m. in front of Thiruvalluvar bus transport, Parrys. It is admitted that it is a busy locality and there are number of shops near the place of offence. There would be number of persons also available but no independent and responsible person had been secured to get their attestation in the mahazar. No explanation has been put forward for not calling any of the shop keepers as witness for this search. The document running to 12 pages are said to have been written at one and the same time namely 4.30 p.m. near the bus stand itself. P.W. 5 stated that all these documents were written in the platform near the place of offence. There was heavy rain at the relevant point of time has been proved by the records, a summon form the Metereological Department itself. Considering the fact that all the documents running to 12 pages were written at about 4.30 p.m. is one more stance to show that the entire document should have been prepared only in the office and it is only a table work on the part of officials. However, the Lower Court came to the rescue of the prosecution and stated that these documents should have been prepared in the office and by mistake the evidence was adduced accordingly. The Court is guided only on the evidence of the witnesses and not on surmise and conjecture. The specific evidence of P.Ws 3 to 5 is that the documents were written in the spot itself and this being so, the contention of the Trial Court that they were written in the office is without any basis. Taking into consideration of the time factor and also that all these 12 pages could not have been written at about 4.30 p.m., the only conclusion that can be drawn is that these documents have been created subsequently to suit the case of prosecution.

11. Learned Addl. Public Prosecutor contended that it cannot be said that Section 50 of the N.D.P.S. Act has been violated in this case. Furthermore, the search in the case in the public place and as such only Section 43 is attracted. Learned Additional Public Prosecutor relied upon a decision of the Apex Court in *Namdi Francis Nwazor v. Union of India*, 1998 Supreme Court Cases (Cri) 1516, it is observed that Section 50 applies to cases of search of any person and not search of any article in the sense that the article is at a distant place from where the offender is actually searched. Evidently, this decision has no application to the case on hand because in the case cited above, the property was secured from the distant place and not from the person.

12. Section 50 of N.D.P.S. Act reads as follows :-

"(1) When any officer duly authorised under Section 42 is about to search any person under the provisions of Section 41, Section 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 departments 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 him before the Gazetted officer or the magistrate referred to in Sub-section (1)."

13. Learned Addl. Public Prosecutor also relied on *V. Muhammed Basheer v. State of Kerala*, 1995 Cri. L.J. 1171 wherein it is observed as follows :-

"It is obligatory on the part of such officer to inform the person to be searched and failure to inform so and failure to take him to the Gazetted officer or the Magistrate on making such request would amount to non-compliance of Section 50 which is mandatory and would affect the prosecution case and vitiate the trial. The result is that in the case of a seizure under Section 43 of the Act, the condition prescribed in Section 50 cannot be said to be mandatory. Section 50 direct the authorised officer to take the person from whom a narcotic drug or psychotropic substance was seized from a public place to the nearest Gazetted Officer of any of the departments mentioned in Section 42 or to nearest Magistrate only if the person so requires."

14. Learned Counsel for the appellants relied on a decision of the Apex Court in *State of Punjab v. Jasbir Singh and Ors.*, 1995 (4) Crimes 765 wherein it is observed as follows :-

"Protection given by Section 50 NDPS Act, 1985 is a valuable right to the offender and compliance thereof intended to be mandatory."

It is necessary to state that the protection given by Section 50 is of valuable right to the offender and the compliance thereof intended to be mandatory. In case the police officer had prior knowledge that illegal transport of the contraband is in movement and persons are in unlawful possession and intends to intercept it, conduct search and consequentially to seize the contraband, they are required to inform the offender that he has the right that the search will be conducted in the presence of a Gazetted officer or a Magistrate. Thereafter on their agreeing to be searched by the police officers, the search and seizure of the contraband from their unlawful possession would

become legal and valid. This decision is applicable to the case on hand.

15. As adverted, there is conflicting versions in the testimony of P.Ws. 3 to 5. This is relating to compliance of mandatory provisions under Section 50 of N.D.P.S. Act. There is a categorical admission on the part of P.W. 4 himself that the appellants wanted to be searched in the presence of nearest Magistrate or a Gazetted Officer, but the same has been denied by P.W. 3 to 5. Hence, there is no difficulty in coming to the conclusion that the mandatory provisions of Section 50 of N.D.P.S. Act has not been complied with and it goes to the root of the matter and as such the entire proceedings are vitiated.

16. Learned Counsel for the appellants also stated that P.W. 5 being the Inspector of Police who was present at the time of search and he was the investigating officer and as such it is fatal to the case of the prosecution. P.W. 5, according to the prosecution, was present with P.Ws. 3 and 4 at the time of search. In fact, P.W. 5 alone took up investigation in the case and he had examined the witnesses. No doubt the successor to P.W. 5 alone had filed the charge sheet. But there is no material to show that he had examined any other witness. It therefore follows that P.W. 5 was the person who really investigated the case. P.W. 5 was the person who had searched the appellants in question and he being the investigation officer, certainly it is not proper and correct. The investigation ought to have been done by any other investigating agency. On this score also, the investigation is bound to suffer and as such the entire proceedings will be vitiated.

17. The Trial Court was simply carried away by the evidence of P.Ws. 3 to 5, who are police official witnesses. There is nothing wrong in accepting the testimony of P.Ws. 3 to 5 if they are reliable and trustworthy. As adverted to, the only independent witness examined on the side of the prosecution turned hostile. Steps were taken to secure the other independent witness viz., Srinivasan, but the address given by him is false. There are number of shops and Transport Working Personnel were very near the place of offence and for reasons best known to the prosecution, they have not chosen to secure any one of them to be witnesses for the seizure. The evidence of P.Ws. 3 to 5 is also mutually contrary relating to the compliance of mandatory provisions under Section 50 of the Act. In fact, the lower Court itself adverted that mere production of contraband in huge quantity ipso facto cannot substitute or supplement the required infallible evidence about the method and fact of recovery thereof from the accused. However, the Trial Court stated that there is no allegation of torture on any of the accused was made against P.Ws. 3 to 5 and, as such, the occurrence could be true. In my view, it is not the way to approach the contentions of the parties. The burden is always upon the prosecution to prove positively that these accused have committed the offence. Even assuming that the contentions of the appellants that they were taken from the house is not substantiated, it does not concluded or lead to any conclusion that the prosecution case ought to be true.

18. The evidence of P.Ws. 3 to 5 only indicated that the case appears to be a table preparation. Ex. P 5 to P9 running to about 12 pages, is said to have come into existence at one and same time viz., 4.30. p.m. In fact, judicial notice also has been taken by the Trial Court that there was heavy rain during the occurrence, from the record filed for and on behalf of the first accused. The witnesses stated that these documents were written in the platform near the spot itself, but the Trial Court

came to the rescue of these witnesses and stated that it must have been prepared in the office. There is absolutely no evidence on the part of P.Ws 3 to 5. This is a strong circumstance to come the conclusion that the occurrence as alleged by the prosecution could not have taken place. Normally, benefit of doubt would be given to the accused but, unfortunately, benefit of doubt in this case has been given to the prosecution. There is also violation of Section 50 of the N.D.P.S. Act and on this ground also, the case of the prosecution has to fail. It appears that the Trial Court has found the appellants guilty based upon the interested testimony of P.Ws. 3 to 5 and also the large quantity of heroin involved in the case. The place of offence is a public place, is not disputed in the case and considering the time of occurrence and place of offence, it is not difficult for prosecution to secure independent witness. When P.W. 4 stated that the appellants have expressed their desire to be searched before the Judicial Magistrate or Gazetted Officer, it has not been complied with and for all these reasons, I am of the view that the Trial Court has not rightly appreciated the evidence of the prosecution witnesses in its proper perspective and wrongly came to the conclusion that they have committed an offence under Section 8(c) read with 21 of N.D.P.S. Act. The prosecution has not let in reliable evidence to bring home the guilt against the appellants and under the circumstance, they are entitled to the benefit of doubt.

19. For the reasons stated above, all the appeals are allowed and the conviction and sentence imposed on the appellants by the Trial Court are set aside and they are found not guilty under Section 8(c) read with 21 of N.D.P.S. Act and they are acquitted. The fine amount, if any, paid by them shall be refunded to them. They should be set at liberty forthwith if not required for any other case.