Pon Adithan vs Deputy Director, Narcotics Control ... on 16 July, 1999

Equivalent citations: AIR 1999 SUPREME COURT 2355, 1999 AIR SCW 2457, 1999 CRILR(SC&MP) 443, 1999 (6) SCC 1, 1999 CRILR(SC MAH GUJ) 443, 1999 (3) LRI 775, 1999 (4) SCALE 89, 1999 SCC(CRI) 1051, 1999 (6) ADSC 367, 1999 CRIAPPR(SC) 338, 1999 CALCRILR 451, 1999 (7) SRJ 350, 1999 (2) UJ (SC) 1272, (1999) 4 JT 540 (SC), (1999) 3 CRIMES 279, (1999) 2 EASTCRIC 222, (1999) 2 EFR 662, (1999) 17 OCR 333, (1999) 2 RAJ LW 318, (1999) 3 RECCRIR 499, (1999) 3 CURCRIR 144, (1999) 6 SUPREME 81, (1999) 25 ALLCRIR 1631, (1999) 4 SCALE 89, (1999) 39 ALLCRIC 330, (1999) 2 ANDHWR 93, (1999) 3 ALLCRILR 41, (1999) 1 RAJ LR 297, (1999) 2 CHANDCRIC 36, (1999) 3 CRIMES 133, (1999) 1 RAJ CRI C 442, (1999) SC CR R 645, (2000) 1 WLC (RAJ) 110

Bench: G.T.Nanavati, N.S.Hegde

PETITIONER:
PON ADITHAN

Vs.

RESPONDENT:
DEPUTY DIRECTOR, NARCOTICS CONTROL BUREAU, MADRAS

DATE OF JUDGMENT: 16/07/1999

BENCH:
G.T.Nanavati, N.S.Hegde

JUDGMENT:

Nanavati,J.

This appeal is directed against the judgment of the High Court of Madras in Criminal Appeal No. 544 of 1989. The High Court confirmed the conviction of the appellant under Section 8© read with Section 21 of the Narcotic Drugs and Psychotrophic Substances Act, 1985 and dismissed the appeal.

A complaint was filed by the respondent against the appellant alleging that the appellant was found in possession of 150 gms of heroin without a valid permit on 13.4.1988 at about 6 P.M. while he was passing on a road in the city of Madras and thus he had committed the aforesaid offence. In order to

prove its case the prosecution led the evidence of Gladys Lilly (P.W.1), who was then working as an Intelligence Officer in the Narcotics Intelligence Bureau, at Madras and who had searched and arrested the appellant. It also examined N. Muthu (P.W.4) who was taken as an independent witness to witness the search and arrest and in whose presence the search and arrest were made; but, he did not support the prosecution. Evidence was also led to prove that what was found from the appellant's possession was di-acetyl Morphine, which is popularly known as 'heroin'. The trial Court believed the evidence of P.W.1 and the confessional statement (Exh. P- 3) made by the appellant before P.W.1 and convicted the appellant.

The High Court after re-appreciating the evidence held that the evidence of P.W.1 was reliable and sufficient to sustain the conviction of the appellant. Probably because the High Court found his evidence sufficient, it did not record any finding with regard to acceptability of the confessional statement of the appellant Mr. Lalit, learned senior counsel for the appellant, submitted that the mandatory requirement of informing the accused about his right under Section 50(1) of the Act to be searched in presence of a gazetted officer or a Magistrate was not complied with in this case and, therefore, it could not have been held that heroin was found from the possession of the appellant. He emphasized that the independent witness to mahazar has not supported the prosecution and the only evidence on the point of search and seizure is of P.W.1. He also drew our attention to the admission made by P.W.1 in her cross examination that she had not prepared any contemporaneous writing on the basis of which it can be said that she had informed the appellant about his right under Section 50(1). Both the Courts below, after due scrutiny of the evidence of P.W.1, has found that P.W.1 was a reliable witness and there was no reason to doubt her version that she had informed the appellant about his said right. After carefully scrutinizing the evidence of P.W.1 we are of the opinion that it can safely be relied upon as it does not suffer from any infirmity nor is there any good reason for not accepting the same. We have scrutinized the evidence of P.W.1with more care because the learned counsel stated before us that P.W.1 herself was subsequently involved in the offence under the Act and, therefore, she cannot be regarded as a reliable witness. After the hearing was concluded but before the judgment could be delivered written submissions were given by the learned Advocate on Record and therein also it is stated that P.W.1 along with her husband has been involved in a case under the Act and that criminal proceedings are going on against them. Apart from the question of admissibility of her evidence we are of the view that her subsequent involvement, if any, in a criminal offence cannot affect her evidence in this case. The incident involving the appellant had taken place in the year 1988 whereas the incident involving P.W.1 is stated to have taken place in the year 1998, that is after 10 years. We therefore, do not think it fit to consider this new material while appreciating the evidence of P.W.1.

It was next contended by Mr. Lalit that oral testimony of a witness alone cannot be regarded as sufficient for establishing that the requirement of Section 50(1) was complied with. To support this contention he relied upon the decision of this court in T.P. Razak vs. State of Kerala [1995 Supp. (4) S.CC. 256]. In that case the Sub-Inspector of Police had searched the accused and recovered brown sugar from him. He deposed before the Court that before the accused was searched he had asked the appellant whether he wanted to be taken before a Gazetted Officer or a Magistrate for the purposes of search and that the accused had replied that it was not necessary. As this fact was not reflected either in the F.I.R. or in the seizure mahazar and the independent witness to the mahazar had not

supported the version of the Sub- Inspector this Court held that the prosecution had failed to establish that there was compliance with the provision of Section 50(1) of the Act. As it appears from the judgment the trial Court in that case had not considered it necessary to asses the evidence of Sub-Inspector of Police since it was of the view that it was not necessary to comply with the provisions of Section 50(1). The High Court had also proceeded on the basis that the said requirement of Section 50(1) is directory and, therefore, its non compliance was not fatal to the prosecution case. It was in the context of these facts and circumstances that this Court held : "Having regard to the fact that the FIR and Seizure Mahazar do not mention about the appellant having been asked before the search was conducted as to whether he would like to be produced before a Gazetted Officer or a Magistrate and the further fact that P.W.1, the other independent witness, also does not state about this we are of the view that the prosecution has failed to establish that there was compliance with the provisions of Section 50 of the Act before conducting the search of the appellant."

In that case no clear finding was recorded regarding credibility of the Sub-Inspector of Police who was the only witness on the point. It was upon appreciation of the evidence led in that case that it was held that the prosecution had failed to establish that there was compliance with the provisions of Section 50(1) while conducting the search of the accused. We, therefore, cannot agree with the submission of Mr. Lalit that this Court in that case has laid down as a preposition of law that in absence of independent evidence or any other supporting documentary evidence, oral evidence of a witness conducting the search cannot be regarded as sufficient for establishing compliance with the requirement of Section 50(1).

Moreover, we have, in this case, the confessional statement (Ext. P-3) made by the appellant which corroborates the evidence of P.W.1. It was, however, submitted by Mr. Lalit that the Courts below had committed a grave error in relying upon the said confessional statement and this Court also should not rely upon the same as the accused had retracted the same and categorically stated that it was not voluntarily made by him. He submitted that the said statement was made while he was in custody and as stated by the appellant in his statement under Section 313 Cr.P.C. it was given by him under threat and pressure. P.W.1 had taken the appellant to her office and the confessional statement came to be recorded at about 8 P.M., no doubt, while the appellant was in custody of P.W.1. But that by itself cannot be regarded as sufficient to hold that the confessional statement was made by the appellant under pressure or compulsion. No complaint was made by the appellant when he was produced before the Magistrate on the next day nor he had made any complaint thereafter till his statement came to be recorded under Section 313 Cr.P.C. It was only during the trial that a suggestion was made to P.W.1 and subsequently when the appellant gave a statement under Section 313 Cr.P.C. he stated that the confessional statement was given by him under threat and pressure. Even while giving his statement under Section 313 Cr.P.C. the appellant had not stated what was the nature of the threat given to him or in which manner the pressure was brought upon him. It was a vague statement. If in such circumstances the trial Court held that the confessional statement was voluntarily made and thought it safe to rely upon the same it cannot be said that it committed any error in doing so. We are also of the view that the said confessional statement was made by the appellant voluntarily and, therefore, it can be used against him. It was lastly contended by Mr. Lalit that in view of inconsistency regarding identity of the sample the

Courts below committed a grave error in holding that the sample which was examined by the chemical analyst was a part of M.O.3, the article which was seized from the appellant. He drew our attention to the evidence of Govinda (P.W.3), who was working as an Assistant in the Court of the Magistrate. He has deposed that under the directions of the Magistrate he had prepared two samples of 5 gms. each out of M.O.3 which was before the Court and the said samples were sent by him to the chemical analyst for analysis. P.W.2, the Chemical Analyst, is his evidence has stated that the sample which he had received from the Court weighed 6.9 gms. Relying upon this inconsistency as regards the weigh it was submitted by the learned counsel that benefit of doubt should be given to the appellant as it cannot be said with certainty that the sample which was examined by the chemical analyst was the same sample which was sent by the Court. On 15.4.1998 P.W.1 had given an application to the Magistrate for drawing a sample from the brown powder which was seized from the appellant and which was believed to be heroin, for analysis by the Forensic Science Laboratory. Granting this application the learned Magistrate directed Govinda (P.W.3), to prepare two samples of 5 gms. each out of M.O.3. The said samples were prepared as stated earlier in the Court and thereafter they were properly put in separate bags and then sealed with the Court seal. One sample was then forwarded with a covering letter which contained necessary details regarding case number and the sample. Therefore even though P.W.3 had stated that he had correctly weighed the two samples and there was no possibility of any mistake on his part much weight can not be given to his evidence as in the forwarding letter prepared by him he had mentioned that the weight was about 5 gms. As the samples were prepared in the Court in presence of the Presiding Magistrate and were properly packed and court seal was applied on them and as the chemical analyst had also found the seal intact there is little room for doubt that the sample which was examined by the chemical analyst was a part of M.O.3. In our opinion, the Courts below did not commit any error in holding that what was found from the appellant was heroin.

As we do not find any substance in any of the contentions raised on behalf of the appellant this appeal is dismissed.