Bai Radha

Vs

The State of Gujarat

Criminal Appeal No. 1 (N) of 1967

(J. C. Shah, V. Ramaswami-I, A. N. Grover JJ)

20.11.1968

JUDGMENT

GROVER, J. -

The sole point which arises for decision in this appeal by special leave is whether the trial became illegal by reason of the search not having been conducted strictly in accordance with the provisions of Section 15 of the Suppression of Immoral Traffic In Women & Girls Act, 1956 (Act CIV of 1956), hereinafter called the "Act".

The facts need not be stated in details. The appellant and two other persons were tried for various offences under the provisions of the Act, the charge substantially against her being that she was keeping a brothel in her house and knowingly lived on the earnings of the prostitution of women and girls. All the three accused persons were acquitted by the magistrate. The State preferred an appeal to the High Court against the appellant and the third accused only. The High Court set aside the order of acquittal in respect of the appellant and convicted her for offences punishable under Sections 3(1) and 4(1) of the Act. She was sentenced to suffer rigorous imprisonment for one year and to pay a fine of Rs. 200/ (in default to suffer further rigorous imprisonment for six months) and to suffer rigorous imprisonment for six months on the second count, the sentence of imprisonment being concurrent.

The prosecution case was that on receiving complaints from several residents of the locality a raiding party was organised. The services of a decoy witness Kishan Taumal were requisitioned and he agreed to work as the punter. After ascertaining that he had no money he was given Rs. 8/- in all. That amount included a currency note of Rs. 5/- and three currency notes of Rs. 1/- each, the numbers of notes having been noted down in the first part of the panchanama. The punter was instructed to hand over the amount for the charges that would have to be paid for having sexual intercourse with any girl or woman in the appellant's house. He was, however, only to engage himself in talk and not the actual act. A punch witness Prem Singh Hiraji was also to accompany the raiding party. The raid was ultimately made according to the original plan and Kishan, the punter managed to engage a women in conversation in room in the house of the appellant. The raiding party found that she had opened buttons of her blouse and she was found with her clothes in such a disordered condition that it was apparent that she was getting ready to have sexual intercourse with Kishan; but on seeing the police party she got up and dressed herself. The seven currency notes, i.e., on five rupee note and two of one rupee currency notes were recovered from the appellant which were marked and which had been given by Kishan. Sub-sections (1) and (2) of Section 15 of the Act provide as follows :

> "(1) Notwithstanding anything contained in any other law for the time being in force, whenever the special police officer has reasonable grounds for believing that an offence punishable under this Act has been or is being committed in respect of a women or girl living in any premises and that such search of the premises with warrant cannot be made without undue delay, such officer may, after recording the ground of his belief, enter and search such premises without a warrant.
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> (2) Before making a search under subsection (1) the special police officer shall call upon two or more respectable inhabitants (at least one of whom shall be a woman) of the locality in which the place to be searched is situate to attend and witness the search, any may issue an order in writing to them or any of them so to do."

What has been stressed greatly by learned counsel for the appellant is that the Act being a special Act its provisions should have been strictly followed. It is pointed out that the panch witness Prem Singh was not an inhabitant of the locality in which the place to be searched was situate. Another panch witness had also been taken who was a woman (Bai Shanta) to satisfy the requirement of sub-section (2) of Section 15 but she also was not an inhabitant of the locality where the house of the appellant was situate. It has been pointed out that in Public Prosecutor, Andhra Pradesh v. Uttaravalli Nageswararao (AIR 1965 SC 176) it was held by Sharfuddin Ahmed, J., that the Act being a special piece of legislation enacted with a specific purpose all the directions contained in Section 15 were mandatory. According to the learned judge while the recording of reasons for proceeding without obtaining the search warrant might not be done, which was a matter of discretion, so far as the requisition of the services of the respectable inhabitants was concerned the direction was mandatory and the legislature by insisting on the presence of one woman mediator at the time of search had undoubtedly chosen to safeguard the interest of the persons with whom the Act was intended to deal. In that case the services of a woman mediator had not been requisitioned at all. The search was held to be altogether illegal with the result that the accused person in that case was acquitted and his acquittal was upheld by the High Court.

In the presence case two main defect have been pointed out in the matter of search; one is that the special police officer Shri Mankad has been found both by the Magistrate and the High Court to have prepared the document Ext. 8/A long after the search. As found by the High Court this document contained reproduction of Section 15(1) and it hardly contained any ground on which the police officer had formed the belief with regard to the matters stated in sub-section (1). The other point which has been pressed on behalf of the appellant relates to contravention of sub-section (2) inasmuch as the panch witnesses were not inhabitants of the locality in which the appellant's haush was situate. The High Court was of the view that power to conduct the search was derived from the statute and not from the recording of reasons and therefore the search was not rendered illegal, in the present case, on account of contravention of Section 15(1) of the Act. On the second point it was held that there was no provision in law which rendered the evidence of the panch witnesses inadmissible even though Section 15(2) had been contravened. The High Court, did not agree with the decision of the Andhra Pradesh High Court that the direction contained in sub-section (2) were of a mandatory nature.

Our attention has been drawn to State of Rajasthan v. Rehman (1960 (1) SCR 991) in which a Deputy Superintendent of Central Excise who had received information that the respondent in that case had cultivated tobacco but had not paid the excise duty, went to search his house. He was obstructed, while making the search with the result that he fell down and was injured. The respondent was prosecuted under Section 353, Indian Penal Code. It was held that Section 165 of

the Code of Criminal Procedure was applicable to such a search and the search being in contravention of that section it was illegal. The respondent, therefore, had been rightly acquitted. In this case however, it was observed that the recording of reasons under Section 165 did not confer on the officer jurisdiction to make search though it is a necessary condition for doing so. Jurisdiction or power to make a search was conferred by the statute and not derived from the recording of reasons. These observations are sufficient to dispose of the first which has been pressed about the omission to record the reasons before the search or even thereafter in a proper way. This case cannot be of such assistance to the appellant because no question is involved in the present case of any public servant having been obstructed in the course of a search conducted under Section 165 of the Criminal Procedure Code. The trial of the appellant was for contravention of certain provisions of the Act and the search was made respect of those offences. The trial having taken place the question of the applicability of Section 537 of the Criminal Procedure Code will at once arise. If the non-observance of the provisions of Section 15(2) is not an illegality but is a mere irregularity then the sentence cannot be set aside unless it can be shown that such irregularity has caused failure of justice. As will be presently seen we are of the opinion that non-compliance with the directions contained in Section 15(2) in the matter of search would only be an irregularity and not such an illegality which will vitiate the trial. The decision in Delhi Administration V. Ram Singh (1962 (2) SCR 694) which concerned offences committed under the Act and on which reliance has been placed on behalf of the appellant involved a different point. There the police officer who had entered the premises where the offences were alleged to be committed was not a special police officer who alone is authorised to do the various things mentioned in the provisions of the Act. It was observed that the Act created new offences and provided for the forum before which they would be tried. Necessary provisions of the Code of Criminal Procedure had been adopted fully or with modification. As the Act provided machinery to deal with the offences created the necessary implication must be that the new machinery was to deal with those offences in accordance with the provisions of the special Act. The entire police work in connection with the purposes of the Act within a certain area had been put in the charge of a special police officer. According to the majority Judgment in that case, only the special police officer was competent to investigate and as the investigation had been conducted by a regular police officer who did not come within the category of a special police officer the order of the magistrate quashing the chargesheet was upheld. This case certainly support one part of the submission of the counsel for the appellant that the Act is a complete Code with respect what has to be done under it. In that sense it would be legitimate to say that a search which is to be conducted under the Act must comply with the provisions contained in Section 15; but it cannot be held that if a search is not carried out strictly in accordance with the provisions of that section, the trial is rendered illegal. There is hardly any parallel between an officer conducting a search who has no authority under the law and a search having been made which does not strictly conform to the provisions of Section 15 of the Act. The principles which have been settled with regard to the effect of an irregular search made in exercise of the powers under Section 165 of the Code of Criminal Procedure would be fully applicable even to a case under the Act, where the search has not been made in strict compliance with its provisions. It is significant that there is no provision in the Act according to which any search carried out in contravention of Section 15 would render the trial illegal. In the absence of such a provision we must apply the law which has been laid down with regard to searches made under the provision of the Criminal Procedure Code.

Now in The State of Uttar Pradesh v. Bhagwati Kishore Joshi (1964 (3) SCR 71) this court had to deal with a case where a booking clerk was stated to have committed an offence of criminal breach of trust. A Sub-Inspector of police made some investigation and submitted a report but this was

done without obtaining the order of a magistrate. Subsequently the permission of the magistrate was obtained to investigate into the case as required by Section 5-A of the Prevention of Corruption Act. After making further investigation he submitted a chargesheet. The respondent in that case was tried and convicted under Section 5(2) of that Act. It was held by this court (by the majority) that there was a contravention of Section 5-A of the Prevention of Corruption Act at the first stage of investigation when the requisite permission of the magistrate had not been obtained but after the permission had been given there was practically a de novo investigation. Therefore the accused not having been prejudiced by the illegality committed by the police, the conviction could not be set aside on the ground of mere irregularity or illegality in the matter of investigation. The following passage at page 84 may be usefully reproduced :-

> "The High Court set aside the conviction on the ground that there was a breach of the mandatory safeguards of the Act in that the first stage of the investigation was contrary to the provision of the Act. But it did not consider the other question whether the said breach caused prejudice to the accused in the matter of his trial. In doing so, the High Court ignore the provisions of Section 537 of the Code of Criminal Procedure. Having carefully gone through the record for the reasons aforesaid, we are satisfied that no such prejudice has been caused to the accused. He had a fair trial and had his full say."

It is abundantly clear that Section 537 of the Cr. P. C. would be applicable to the proceedings in the present case. Section 5(2) of the Code provides that all offences under the Indian Penal Code shall be investigated inquired into, tried and otherwise dealt with according to the provisions of the Cr. P. Code. All offences under any other law shall he similarly investigated, etc. according to the same provisions but subject to any enactment regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences. According to Section 22 no court inferior to that of a magistrate as defined in clause (c) of Section 2 shall try any offence under Section 3 to 8 of the Act.

Thus shall proceedings including investigation had to be conducted in accordance with the procedure laid down in the Criminal Procedure Code except to the extent of the specific provisions contained in the Act. No such provision has been brought to our notice nor indeed has it been contended that Section 537 of the Code of Criminal Procedure would not govern the investigation, inquiry or trial of the offences with which the appellant was charged. The ratio of the decision in the case of Bhagwati Kishore Joshi (1964 (3) SCR 71) must be followed and in the absence of any prejudice having been shown by non-compliance with the provisions of sub-section (1) and (2) of Section 15 of the Act, the order of the High Court must be upheld.

In conclusion it may be observed that the investigating agencies cannot and ought not to show complete disregard of such provisions as are contained in sub-sections (1) and (2) of Section 15 of the Act. The Legislature in its wisdom provided special safeguards owing to the nature of the premises which have to be searched involving inroads on the privacy of citizens and handling of delicate situations in respect of females. But the entire proceeding and the trial do not become illegal and vitiated owing to the non-observance of or non-compliance with the directions contained in the aforesaid provisions. The court, however, has to be very careful and circumspect in weighing the evidence where there has been such a failure on the part of the investigating agency but unless and until some prejudice is shown to have been caused to the accused person or persons the conviction and the sentence cannot be set aside. It may not be out of place to reiterate what was said in H. N. Rishbud and Inder Singh v. The State of Delhi (1955 (1) SCR 1150), that a defect or an illegality in the investigation, however serious, has no direct bearing on the competency or the

procedure relating to cognizance or trial of an offence and that whenever such a situation arises, Section 537 of the Code of Criminal Procedure is attracted and unless the irregularity or the illegality in the investigation or trial can be shown to have brought about a miscarriage of justice, the result is not affected.

For the above reasons this appeal fails and it is dismissed.

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