State of H.P.

Vs

Pirthi Chand and Another

Criminal Appeal No. 1752 of 1995

(K. Ramaswamy, S. B. Majmudar JJ)

30.11.1995

ORDER

1. Leave granted.

2. We have heard the counsel on both sides. On 24-3-1986, on receipt of a secret information that a contraband, viz., Charas was being dealt with at the bus stand, Head Constable Rattan Singh along with other police officials was present at the bus stand, Amb. They secured the presence of one Pradhan Subhas Chand and one Gurdas Ram and raided the house of the first respondent. On search, they found 1 kilo 15 grams of Charas. They took sample and divided the same into three parts. One was given to the accused, another was sent to the court and third one was sent to the chemical examiner for analysis. On analysis, it was found that it was Charas. Accordingly, charge-sheet was filed to prosecute him under Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short "the Act"). After considering the charge-sheet, the learned Sessions Judge by his order dated 6-7-1987 discharged the respondent from the offence under Section 20. On revision, the High Court by the impugned order dated 4-6-1992 made in Criminal Revision No. 118 of 1987 confirmed the same. Thus this appeal by special leave.

3. The question is whether the learned Sessions Judge was justified, at the stage of taking cognizance of the offence, in discharging the accused, even before the trial was conducted on merits, on the ground that the provisions of Section 50 of the Act had not been complied with. This Court in State of Punjab v. Balbir Singh [(1994) 3 SCC 299 : 1994 SCC (Cri) 634] has considered the provisions of the Act. Section 50 has been held to be mandatory. In paragraph 16, this Court has held that it is obligatory on the part of the empowered or the authorised officer to inform the suspect that, if so required, he would be produced before Gazetted Officer or a Magistrate and search would be conducted in his presence. It was imperative on the part of the officer to inform the person of the above right and if he failed to do the same, it amounted to violation of the requirement of Section 50 of the Act. It was held that when the person was searched he must have been aware of his right and that it could be done only if the authorised or empowered officer informed him of the same. Accordingly, this Court by implication read the obligation on the part of authorised officer to inform the person to be searched of his right to information that he could be searched in the presence of the Gazetted Officer or the Magistrate. In Saiyad Mohd. Saiyad Umar Saiyad v. State of Gujarat [(1995) 3 SCC 610 : 1995 SCC (Cri) 564 : JT (1995) 3 SC 489] a three-Judge Bench of this Court had reiterated the above view and held that having regard to the grave consequences that might entail the possession of illicit articles under the Act, viz., the shifting of the onus to the accused and the severe punishment to which he became liable, the legislature had enacted safeguards contained in Section 50. Compliance of the safeguards in Section 50 is mandatory obliging the officer concerned to inform the person to be searched of his right to demand that search could be conducted in the

presence of a Gazetted Officer or a Magistrate. The possession of illicit articles has to be satisfactorily established before the court. The officer who conducts search must state in his evidence that he had informed the accused of his right to demand, while he is searched, in the presence of a Gazetted Officer or a Magistrate and that the accused had not chosen to so demand. If no evidence to that effect is given, the court must presume that the person searched was not informed of the protection the law gives him and must find that possession of illicit articles was not established. The presumption under Article 114 Illustration (e) of the Evidence Act, that the official duty was properly performed, therefore, does not apply. It is the duty of the court to carefully scrutinise the evidence and satisfy that the accused had been informed, by the officer concerned, that he had a right to be searched before a Gazetted Officer or a Magistrate and that the person had not chosen to so demand.

4. It is to be seen whether the accused has been afforded such a right and whether the authorised officer has violated the mandatory requirement, as a question of fact, has to be proved at the trial. In Pooran Mal v. Director of Inspection (Investigation) [(1974) 1 SCC 345 : 1974 SCC (Tax) 114] a Constitution Bench of this Court had held that power of search and seizure, is, in any system of jurisprudence, an overriding power of the State for the protection of social security and that power is necessarily regulated by law. A search by itself is not a restriction on the right to hold and enjoy property, though seizure is a temporary restriction to the right of possession and enjoyment of the property seized. However, the seizure will be only temporary and limited for the purpose of the investigation. The power of search and seizure is an accepted norm in our criminal law envisaged in Sections 96 to 103 and 165 of the Criminal Procedure Code, 1973 (for short "the Code"). The Evidence Act permits relevancy as the only test of admissibility of evidence. The evidence obtained under an illegal search and seizure does not exclude relevant evidence on that ground. It is wrong to invoke that spirit of the Constitution to exclude such evidence. The decisions of the American Supreme Court spelling out certain constitutional protections in regard to search and seizure are not applicable to exclude the evidence obtained on an illegal search. Courts in India refuse to exclude relevant evidence merely on the ground that it is obtained by illegal search and seizure. When the test of admissibility of evidence lies in relevancy, unless there is an express or necessarily implied prohibition in the Constitution or other law, evidence obtained as a result of illegal search and seizure is not liable to be shut out. Search and seizure is not a new weapon in the armoury of those whose duty it is to maintain social security in its broadest sense. If the safeguards are generally on the lines adopted by the Code, they would be regarded as adequate and render the restrictions imposed as reasonable measures.

5. It would be seen that the organised traffic in contraband generates deleterious effect on the national economy affecting the vitals of the economic life of the community. It is settled law that illegality committed in investigation does not render the evidence obtained during that investigation inadmissible. In spite of illegal search property seized, on the basis of said search, it still would form basis for further investigation and prosecution against the accused. The manner in which the contraband is discovered may affect the factum of discovery but if the factum of discovery is otherwise proved then the manner becomes immaterial.

6. In Radha Kishan v. State of U.P. [AIR 1963 SC 822 : (1963) 2 LLJ 667] this Court held that the evidence obtained by illegal search and seizure would not be rejected but requires to be examined carefully. In State of Maharashtra v. Natwarlal Damodardas Soni [(1980) 4 SCC 669 : 1981 SCC (Cri) 98 : AIR 1980 SC 593], even if the search was illegal, it will not affect the validity of the seizure and further investigation of the authorities or the validity of the trial which followed on the complaint by the customs officials. In Shyam Lal Sharma v. State of M.P. [(1972) 1 SCC 764 : 1972

SCC (Cri) 470 : AIR 1972 SC 886] it was held that even if the search and seizure is illegal being in contravention of Section 165, that provision does not have any effect in its application to the subsequent steps taken in the investigation. In State of Kerala v. Alasserry Mohd. [(1978) 2 SCC 386 : 1978 SCC (Cri) 198 : AIR 1978 SC 933] this Court had held that failure to comply strictly with the statutory provisions by the Food Inspector would not vitiate the trial and conviction of the accused.

7. It would thus be settled law that every deviation from the details of the procedure prescribed for search does not necessarily lead to the conclusion that search by the police renders the recovery of the articles pursuant to the illegal search irrelevant evidence nor the discovery of the fact inadmissible at the trial. Weight to be attached to such evidence depends on facts and circumstances in each case. The court is required to scan the evidence with care and to act upon it when it is proved and the court would hold that the evidence would be relied upon.

8. In Sunder Singh v. State of U.P. [AIR 1956 SC 411 : 1956 Cri LJ 801] a three-Judge Bench of this Court held that under Section 103 of the Code of Criminal Procedure, 1898 though respectable inhabitants of the locality were not associated with the search, that circumstance would not invalidate the search. It would only affect the weight of the evidence in support of the search and the recovery. At the highest, the irregularity in the search and the recovery would not affect legality of the proceedings. In State of Maharashtra v. P. K. Pathak [(1980) 2 SCC 259 : 1980 SCC (Cri) 428 : AIR 1980 SC 1224] it was held that absence of any independent witness from the locality to witness the search does not affect the trial and the conviction of the accused under the Customs Act. In Matajog Dobey v. H. C. Bhari [AIR 1956 SC 44 : (1955) 2 SCR 925 : 1956 Cri LJ 140] it was held that when the salutary provisions have not been complied with, it may, however, affect the weight of the evidence in support of the search or may furnish a reason for disbelieving the evidence produced by the prosecution unless the prosecution properly explains such circumstances which made it impossible for it to comply with these provisions. In Balbir Singh case [(1994) 3 SCC 299 : 1994 SCC (Cri) 634] this Court held that if the provisions of the Act have not been complied with, the Court has to consider whether any prejudice has been caused to the accused and also examine the evidence in respect of the search in the light of the fact that the provisions have not been complied with and further consider whether weight of evidence is in any manner affected because of the non-compliance. The testimony of witness is not to be doubted or discarded merely because he happens to be an official. As a rule of caution and depending upon the circumstances of the case, the court may look for corroboration from independent evidence. This again depends upon the question whether the official has deliberately failed to comply with the provisions or failure was due to lack of time and opportunity to associate some independent witness with the search and strictly comply with the provisions.

9. In Rakesh Kumar v. State [Delhi Admn.] [1994 Supp (3) SCC 729 : 1995 SCC (Cri) 189] a two-Judge Bench of this Court held that in spite of non-examination of the investigating officer no inference could be drawn against the prosecution. Non-examination did not in any way affect the prosecution case nor prejudiced the accused in this defence. The court has to consider the evidence of the witnesses examined. Failure to join independent witness of locality is also not fatal. Conviction based on evidence of police officers alone is not improper. In that case since witnesses were not willing to come and associate with the search under the TADA Act, this Court upheld the evidence given by the police officers and accepted the finding of the High Court which relied on the evidence of police officers and the conviction was upheld.

10. The question then is whether the High Court would be justified in exercising its inherent power

under Section 482 of the Code or under Article 226 of the Constitution to quash the FIR/charge-sheet/complaint.

11. In State of Haryana v. Bhajan Lal [1992 Supp (1) SCC 335 : 1992 SCC (Cri) 426] a two-Judge Bench of this Court laid down certain broad tests to exercise the inherent power or extraordinary power of the High Court. It is not necessary to reiterate the guidelines. Suffice it to state that they are only illustrative. The High Court should sparingly and only in exceptional cases, in other words, in rarest of rare cases, and not merely because it would be appealable to the learned Judge, be inclined to exercise the power to quash the FIR/charge-sheet/complaint. In that case the Court held that the FIR should not be quashed since it disclosed prima facie cognizable offences to proceed further in the investigation. In Rupan Deol Bajaj v. Kanwar Pal Singh Gill [(1995) 6 SCC 194 : 1995 SCC (Cri) 1059 : JT (1995) 7 SC 299] this Court reiterated the above view and held that when the complaint or charge-sheet filed disclosed prima facie evidence the court would not weigh at that stage and find out whether offence could be made out. The order of the High Court exercising the power under Article 226 was accordingly set aside.

12. It is thus settled law that the exercise of inherent power of the High Court is an exceptional one. Great care should be taken by the High Court before the embarking to scrutinise the FIR/charge-sheet/complaint. In deciding whether the case is rarest of rare cases to scuttle the prosecution in its inception, it first has to get into the grip of the matter whether the allegations constitute the offence. It must be remembered that FIR is only an initiation to move the machinery and to investigate into cognizable offence. After the investigation is conducted (sic concluded) and the charge-sheet is laid, the prosecution produces the statements of the witnesses recorded under Section 161 of the Code in support of the charge-sheet. At that stage it is not the function of the court to weigh the pros and cons of the prosecution case or to consider necessity of strict compliance of the provisions which are considered mandatory and its effect of non-compliance. It would be done after the trial is concluded. The court has to prima facie consider from the averments in the charge-sheet and the statements of witness on the record in support thereof whether court could take cognizance of the offence on that evidence and proceed further with the trial. If it reaches a conclusion that no cognizable offence is made out, no further act could be done except to quash the charge-sheet. But only in exceptional cases, i.e., in rarest of rare cases of mala fide initiation of the proceedings to wreak private vengeance process of criminal is availed of in laying a complaint or FIR itself does not disclose at all any cognizable offence - the court may embark upon the consideration thereof and exercise the power.

13. When the remedy under Section 482 is available, the High Court would be loath and circumspect to exercise its extraordinary power under Article 226 since efficacious remedy under Section 482 of the Code is available. When the court exercises its inherent power under Section 482, the prime consideration should only be whether the exercise of the power would advance the cause of justice or it would be an abuse of the process of the court. When investigating officer spends considerable time to collect the evidence and places the charge-sheet before the court, further action should not be short-circuited by resorting to exercise inherent power to quash the charge-sheet. The social stability and order requires to be regulated by proceeding against the offender as it is an offence against the society as a whole. This cardinal principle should always be kept in mind before the embarking upon exercising inherent power. The accused involved in an economic offence destabilises the economy and causes grave incursion on the economic planning of the State. When the legislature entrusts the power to the police officer to prevent organised commission of the offence or offences involving moral turpitude or crimes of grave nature and are entrusted with power to investigate into the crime in intractable terrains and secretive manner in concert, greater

circumspection and care and caution should be borne in mind by the High Court when it exercises its inherent power. Otherwise, the social order and security would be put in jeopardy and grave risk. The accused will have field day in destabilising the economy of the State regulating under the relevant provisions.

14. The evidence collected in a search in violation of law does not become inadmissible in evidence under the Evidence Act. The consequence would be that evidence discovered would be to prove unlawful possession of contraband under the Act. It is founded in Panchnama to seize the contraband from the possession of the suspect/accused. Though the search may be illegal but the evidence collected, i.e., Panchnama etc., nonetheless would be admissible at the trial. At the stage of filing charge-sheet it cannot be said that there is no evidence and the Magistrate or the Sessions Judge would be committing illegality to discharge the accused on the ground that Section 50 or other provisions have not been complied with. At the trial an opportunity would be available to the prosecution to prove that the search was conducted in accordance with law. Even if search is found to be in violation of law, what weight should be given to the evidence collected is yet another question to be gone into. Under these circumstances, the learned Sessions Judge was not justified in discharging the accused after filing of the charge-sheet holding that mandatory requirements of Section 50 had not been complied with.

15. The next question is whether at this belated stage, it would be necessary to remit the matter for trial. In view of the fact that more than ten years have passed and the contraband seized is not of a considerable magnitude, we think that it is not a fit case to remit at this stage for trial but non-remittance on facts of this case should not be used as precedent in future cases.

16. The appeal is accordingly disposed of.