

Karnail Singh v. The State of Punjab (S. S. Dewan, J.)

such a case it could not be held that the Court was prima facie satisfied about the existence of the legal ground for the ejectment because the legal ground envisaged therein is one that is mentioned by the statute and not the one which lies out side the statute.

9. For the reasons afore-mentioned I hold that the order of the Executing Court is palpably erroneous and illegal. Hence the petition is allowed, the order of the Executing Court is set aside and the Executing Court is directed to forthwith execute the decree of ejectment in accordance with law and the objections under section 47 of the Code of Civil Procedure are dismissed.

H.S.B.

Before C. S. Tiwana and S. S. Dewan, JJ.

KARNAIL SINGH,—Petitioner.

versus

THE STATE OF PUNJAB,—Respondent.

Criminal Revision No. 1155 of 1981.
January 28, 1982.

Code of Criminal Procedure (II of 1974)—Section 100(4) & 103—Punjab Excise Act (I of 1914)—Section 50—Excise Act providing that all searches to be made in accordance with the provisions of Section 100(4) of the Code—Search not held in accordance therewith—Such search—Whether illegal—Evidence collected in such search—Whether admissible—Weight to be attached to such evidence—Conviction—Whether could be based thereon.

Held, that Section 50 of the Punjab Excise Act, 1914 provides that all arrests and searches etc. under the provisions of this Act are to be made in accordance with the provisions of Section 110(4) of the Criminal Procedure Act, 1973. However, even if the search is made in contravention of this provision the evidence collected does not become inadmissible and conviction can be recorded on the basis of the evidence so collected. Furthermore such contravention would not invalidate the search but being an irregularity in the search and recovery, it would affect the weight of evidence thereby collected.

(Paras 8 & 15).

Gurnam Singh vs. The State of Punjab. 1981 C.L.R. 438. Overruled.

Petition Under Section 401 Cr.P.C. for revision of the Order of the Court of Sh. J.S. Sidhu, Sessions Judge, Patiala dated with August, 1981 modifying that of Shri H. R. Kaushik, P.C.S., Judicial Magistrate, 1st Class, Patiala dated 27th May, 1981 enlarging the convict in a charge under section 61(1) (c) Punjab Excise Act on probation on his entering into a bond in the sum of Rs. 5,000 with one surety for two years to keep the peace and be of good behaviour and to appear to receive sentence when called upon during this period. He is to remain under the supervision of the District Probation Officer during these two years and to execute a bond in the sum of Rs. 500 in this behalf. He is also to pay Rs. 300 as costs of proceedings to the State.

K. G. Chaudhry, Advocate, for the Petitioner.

D. S. Brar, A.A.G. Punjab, for the Respondent.

JUDGMENT

S. S. Dewan, J.

(1) The primary question for determination in this revision is whether the non-compliance with the provisions of S. 100(4) of the Code of Criminal Procedure, 1973, would render the search illegal.

(2) Karnail Singh, petitioner was convicted under S. 61(1) (c) of the Punjab Excise Act and sentenced to one year's rigorous imprisonment and a fine of Rs. 5,000 by the Judicial Magistrate, Patiala. On appeal, the learned Sessions Judge, Patiala, while maintaining his conviction released him on probation for a period of two years but ordered him to pay Rs. 300 as costs of the proceedings. Feeling aggrieved with the order, he has now come up in revision.

(3) The accusation against the petitioner as appearing from the impugned judgments were that on 29th of July, 1979, on receipt of secret information, Inspector Kasturi Lal formed a raid party by joining with him Excise Inspector Gurmel Singh and an independent person Ram Asra from Samana. The petitioner was surprised at his house situated in Samana and was found working a still for distillation of illicit liquor. He was apprehended and taken into custody. The still was cooled and dismantled and its component parts as usual were taken into possession. The sample sent to the Chemical Examiner was found to be liquor of illicit origin. Ram Asra was not examined by the prosecution as he was stated to have been won over

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by the accused. The prosecution case primarily rested on the testimony of Excise Inspector Gurmel Singh, P.W. 1 and Inspector Kasturi Lal, P.W. 2.

(4) The accused denied the prosecution allegations and pleaded false complicity in the case. Tehal Singh was examined in defence. Both the courts below on critical appraisal accepted the testimony of the prosecution witnesses and consequently convicted and sentenced the accused as indicated above.

(5) At the motion stage before K. S. Tiwana, J., the main point that was urged by the learned counsel for the petitioner is that the mandatory provisions contained in S. 100(4) of the Code of Criminal Procedure, 1973, have not been complied with and, therefore, the trial is vitiated and the conviction is bad. In support of this contention the learned counsel relied on a Single Bench decision of this Court reported as *Gurnam Singh v. The State of Punjab*, (1). In that case under section 61(1)(c) of the Punjab Excise Act, the courts below convicted the accused, but his conviction was set aside on revision by A. S. Bains, J. with the following observation :

“There is legal infirmity in the prosecution case also, that is the provisions of S. 100, Criminal Procedure Code, are not complied with. Although the raid was conducted in the house of the petitioner in village Mustafabad during day time yet no independent person from the locality was associated in the search of the petitioner’s house. Head-Constable Gurdip Singh has not certified that no such person was available in the locality. S, 100(4), Criminal Procedure Code, is mandatory.”

(6) K. S. Tiwana, J., took a contrary view of the aforesaid decision made by A. S. Bains, J., and admitted the case to the Division Bench for reconsideration if the decision in *Gurnam Singh’s case* (supra).

(7) The learned counsel for the petitioner has argued that the search being not conducted strictly in accordance with the provisions of S. 100(4) of the Criminal Procedure Code, the evidence discovered by the search becomes inadmissible and the conviction

(1) 1981 C.L.R. 438.

based on such inadmissible evidence is unsustainable. In support of this contention, the learned counsel placed reliance on the decisions in *A. P. Kuttan Panicker and others v. State of Kerala*, (2) *Santa Singh v. The State*, (3) and *State of Punjab v. Hakam Singh and others*, (4). It is needless to refer to the decisions in the afore-said cases because the ratio thereof is not applicable to the facts and circumstances of this case.

(8) Section 50 of the Punjab Excise Act provides that all arrests and searches etc. under the provisions of this Act shall be made in accordance with the provisions of the Criminal Procedure Code. S. 100(4) of the Code reads as under :

“100(4) Before making a search under this Chapter, the Officer or other person about to make it shall call upon two or more independent and respectable inhabitants of the locality in which the place to be searched is situate or of any other locality if no such inhabitant of the said locality is available or is willing to be a witness to the search, to attend and witness the search and may issue an order in writing to them or any of them so to do.”

(9) From the evidence on record we find that there is no contravention of the provisions of S. 100 of the Code. Before making the search, Inspector Kasturi Lal had joined with him Ram Asra, who hails from the same locality. He was, however, left out by the prosecution as having been won over by the accused. Now assuming that there was contravention of the provisions contained in S. 100(4) of the Code and the search was thereby defective, a plethora of judgments have uniformly held that it will not vitiate the trial and make the evidence of such officers inadmissible in evidence.

(10) One of the earliest cases is that of *Barindra Kumar Ghose v. Emperor* (5). It was contended in that case that the evidence discovered by the search was not admissible as the search was held

(2) 1963 (1) Cr. L.J. 669.

(3) 1970 P.L.R. 618.

(4) 1978 Cr. L.J. 757.

(5) I.L.R. 37 Cal. 467.

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in disregard of the provisions of the Code. The Court while disagreeing with the contention that the searches were illegal, held that even on the assumption that they were illegal, the evidence was not inadmissible. The learned Chief Justice stated that, "what would otherwise be relevant does not become irrelevant because it was discovered in the course of a search in which the provisions of the Criminal Procedure Code were disregarded."

(11) A full Bench of the Madras High Court in *Solai Naik v. Emperor*, (6) also was of the same view. In that case, a police officer conducted a search at a place beyond his station limits and the question was raised whether that search list could be admitted in evidence and other evidence of the search could be let in. It was held that even though the search might be illegal, the evidence was not inadmissible.

(12) In *Emperor v. Alladad Khan* (7), a Division Bench of the Allahabad High Court set aside the order of acquittal stating that whether the search was legal or not, there was evidence in the case that the accused had kept contraband articles in his house and that the accused should, therefore, be convicted.

(13) In *Ramarao Ekoba v. The Crown*, (8), Hemeon, J., held that "Although the failure to comply with the provisions regulating searches may cast doubts upon the *bona fide* of the officers conducting the search, there is nothing in law which makes the evidence relating to an irregular search inadmissible and a conviction based on such evidence is not invalid on that ground alone".

(14) In *re Govindan Nair* (9), it was held that the non-compliance with the provisions of S. 103 Cr. P.C. would not render the search illegal. The circumstance, would only affect the weight of the evidence in support of the search and the recovery and it would not affect the legality of the search itself. The weight to be attached to the evidence depends on the circumstances of each case.

(6) I.L.R. 34 Mad. 349.

(7) I.L.R. 35 All. 358.

(8) A.I.R. 1951 Nag. 237.

(9) A.I.R. 1959 Mad. 544.

If the Court is satisfied, as to finding of articles, irregularity of search is no bar to conviction. Evidence found in an illegal search is not inadmissible in evidence.

(15) We have also the authoritative pronouncements of the Supreme Court. In *Sunder Singh v. State of Uttar Pradesh* (S) (10), it was held that "assuming that the witnesses who actually witnessed the search were not respectable inhabitants of the locality, that circumstances would not invalidate the search. It would only affect the weight of the evidence in support of the search and the recovery. Hence at the highest the irregularity in the search and the recovery, in so far as the terms of S. 103 had not been fully complied with, would not affect the legality of the proceedings. It only affected the weight of evidence which is a matter for courts of fact and the Supreme Court would not ordinarily go behind the findings of fact concurrently arrived at by the Courts below". Similar view was taken in *Radha Kishan v. The State of Uttar Pradesh* (11).

(16) It will be plain from the aforementioned catena of authorities that *Gurnam Singh's case* (supra), was not correctly decided and the dictum laid down therein that the failure to join two independent witnesses from the locality at the time of search would vitiate the trial or prevent the conviction being made, has to be disapproved.

(17) Adverting now to the merits of the case, a fragmentary challenge to the independence of the official witnesses was made. Inspector Kasturi Lal and Excise Inspector Gurmel Singh must be held to be disinterested and their testimony as observed by the Supreme Court, a number of times cannot be doubted merely on the ground of being official witnesses.

(18) The revision petition is without merit and is hereby dismissed.

H.S.B.

(10) A.I.R. 1956 S.C. 411.

(11) A.I.R. 1963 S.C. 822.