

(2001) 09 AHC CK 0004

In the Allahabad High Court

Case No : Criminal Appeal No. 269 and 270 of 1994

Balbiri

APPELLANT

Vs

State of U.P.

RESPONDENT

Date of Decision : 26-09-2001

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161

Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 20, 50

Citation : (2002) CriLJ 1513

Hon'ble Judges : S.K. Agarwal, J

Bench : Single Bench

Advocate : Sunil Rai, for the Appellant; A.G.A., for the Respondent

Final Decision : Allowed

Judgement

S.K. Agarwal, J.—These are two appeals. Cri. Appeal No. 269 of 1994 was filed by Smt. Balbiri and the other appeal No. 270 of 1994 was filed by Smt. Nirmala. Both these appeals arise from the same F.I.R. and the arrest effected on 18-6-1988 at 6.30 p.m. from one and the same place. They are decided by a common judgment to avoid any repetition of facts.

2. Smt. Balbiri has preferred appeal against her conviction u/s 20 of N.D.P.S. Act and was sentenced to 10 years R.I. and a fine of Rs. 1,00,000/-. In default of payment of fine she is to undergo R.I. for a period of 5 years.

3. The brief story of the case is that on 18-6-1988, S.I. Udal Singh along with S.I. O.P. Sharma and large contingent of other police constables in a P.A.C. truck was on Gast duty. When he reached in the premises of Shalimar Garden he received an information from Mukhbir (informer) that some men and women having formed a gang have come from Delhi and are selling smack at Bhopura Road. Believing the information to be true, he came to the police out post Shalimar Garden and collected H.C. Mahabir Singh, Constable Saheb Singh and Constable Harvir Singh from there and proceeded towards Bhopura road. From

the road also he picked up S.I. H.S. Cheema. Constable Harpal Singh, Constable Samar Pal, Constable Ram Kishan, Constable Jaane Alam, who were already on Gast duty there. He also tried to take some public witnesses but none of them agreed to go with them. They gave their mutual search to each other. No narcotic drugs and psychotropic substances were found with any one of them. Thereafter he along with police force proceeded to Bhopura road and reached at the hotel of Dharma. He found near the country liquor Theka on the road some men and women sitting and some standing. They were selling smack. The informer pointed toward them and told that they are selling smack after bringing it from Delhi. The informer thereafter went away. The police truck stopped near these persons who were selling smack. They got down from the vehicle and arrested them after using some force at about 6.30 pm. On the search of 8 arrested persons namely Sukhi wife of Balbir, Balbiri wife of late Hajari, Nirmala wife of Kuldeep alias Kalli, Saroj wife of Deep Chand alias Phate, Gajanand son of Bans Gopal, Dinesh son of Gajanand, Ramesh son of Gajanand and Ramu son of Gurudutt. All these persons belong to Sansi. From Sukhi, from her right hand pocket of Kurta, 100 gms. of smack contained in a plastic packet and from her right hand 13 packs of smack and Rs. 20/- were recovered. From Balbiri, from her pocket of the Kurta, 15 packs of smack and Rs. 110/- were recovered, From Nirmala, from right pocket of her Kurta 10 packs of smack and Rs. 50/- were recovered. From Saroj, from her right pocket of Kurta, 8 packs of smack and Rs. 2.90/- were recovered. From Gajanan, from his right hand pocket of Pant 12 packs of smack and some cash was recovered. A wrist watch from his right hand was also recovered. From Dinesh, from left packet of Pant 7 packets of smack and Rs. 2/- were recovered. From Ramesh, from his left pocket of Pant, 8 packs and Rs. 3/- were recovered. From Ramu 9 smack packs and Rs. 20/- were recovered. This in the nutshell is the entire recovery from the arrested persons.

4. After conclusion of the investigation chargesheet was submitted by police against these 8 persons.

5. In support of its case, the prosecution has examined two witnesses only. PW 1 is S.I. Udal Singh and PW 2 is H.C. Mahabir Singh posted at the police out post Shalimar garden. Even the investigating officer of the case was not examined to enable these appellants to prove the contradictions occurring in the statements of these witnesses.

6. There is another appeal filed by Smt. Nirmala arrested in the same incident by the police of P.S. Sahibabad. The same set of witnesses Udal Singh PW 1 and H.C. Mahabir Singh PW 2 were examined. In this case also the investigating officer was not examined.

7. The statements of these witnesses for both the appellants in these appeals are verbatim the same, therefore, I am not required to record any separate finding in favour of this appellant. These two appeals were heard on 5-7-2000 and 11-7-2000. The evidence on comparison was found to be a verbatim repetition of the statements recorded in the paper book of Balbiri. In the circumstance, the

finding recorded by me in favour of appellant Balbiri will squarely apply to the case of this appellant as well. The investigating officer in this case was also not examined as such she was unable to point the contradictions occurring in their statements from the statements u/s 161, Cr.P.C. with regard to the compliance of Section 50 of N.D.P.S. Act. Especially in the F.I.R. It is contended that PW 1 has not recorded that any suggestion was given to the accused persons for giving their search before a Gazetted Officer or Magistrate. In his testimony he has stated that suggestion to give search before the Gazetted Officer was given but this has not been so stated in the F.I.R. or the recovery memo. In these circumstances, there is no compliance of Section 50 of N.D.P.S. Act.

8. It is contended by learned counsel for the applicant that there is absolutely no compliance of Section 50 of the N.D.P.S. Act. The provisions of section are held mandatory by the Apex Court. In the absence of compliance of these provisions no conviction can be procured or upheld by this Court. It is further contended that these recoveries were foisted upon the appellants.

9. From an examination of the statement of PW 1 Udai Singh, it is clear that no compliance of the provisions of Section 50 of the N.D.P.S. Act was made by this witness before effecting the search and consequent recoveries. This witness has claimed that they had started from the police station at 4.00 pm. The place of occurrence is only 2 Kms. from the police station. No female police personnel accompanied them despite the information that men and women folk are doing the business of smack there. Even at the time of arrest and search, no female police personnel was there. The personal search were taken and given at Shalimar Garden and not at the spot. From Shalimar Garden, the place of occurrence is 1/2 a km. No fact about the mutual search by police men is disclosed by this witness in F.I.R. When they had seen the accused persons for the first time, the distance between them was 200-250 yards. It is unreliable that accused had not seen the police party coming in a P.A.C. truck. They were unable to see that in between these 8 accused, who of them were close to them and who was at a maximum distance. They had seen the persons who were purchasing the smack but no attempt was made to arrest those persons. Who arrested whom he was not able to disclose. He had admitted that the contents of the provisions of N.D.P.S. Act, are not known to him. It is strange enough that without knowing the informer personally and without making any verification of his version, they had started and rushed to the spot. He claimed that he had asked from the accused persons that if they desire, their search may be taken before the Gazetted Officer but they declined his suggestions. He has denied that it is wrong that he had not suggested this fact to the accused persons before their personal search was taken by him. As a matter of fact omission of this fact could not be proved by the accused persons against the prosecution since the investigating officer of the case was not produced. This lapse has seriously prejudiced the defence. The conduct of the prosecution in not examining the investigating officer in this case is not easily understandable.

10. The statement of PW 2 H.C. Mahabir Singh who was posted at Police Out Post Shalimar Garden, P.S. Shahibabad is that PW 1 came to the police out post at about 6.00 p.m. and he was taken along with other policemen from there. The place of occurrence is about 3 1/2 Km. from this police out post. The vehicle was left at the hotel of Dharmu then he stated that he went up to the spot on the vehicle. Accused persons were seen by them from a distance of 200-250 steps. The truck was stopped 6-7 steps from the accused persons. Sukhi was selling smack sitting first in the row. They had seen the people purchasing smack from them. No attempt to arrest any of these purchasers was made. They managed to run away because they had already arrested 8 accused persons. He failed to identify appellant Balbiri in Court and instead of her he has identified Nirmala as Balbiri. In the circumstances the evidence of these two witnesses does not inspire the confidence of this Court. The judgment of the apex Court State of Punjab Vs. Baldev Singh, decided by a Full Bench comprising of Dr. A.S. Anand, Chief Justice of India and 4 other Hon'ble Judges of the apex Court was cited before this Court. It was held by the apex Court that failure to comply the said provisions by the police results into prejudice to the accused. It also affects adversely the search and recoveries. The conviction based solely on the recovery made from such accused cannot be held lawful. The relevant paragraphs are 24, 32 and 57. The provisions of Section 50 of the N.D.P.S. Act were held mandatory by the apex Court in the judgment.

11. Thus, the failure of the prosecution to comply with the mandatory provisions of Section 50 of the N.D.P.S. Act in the present case entitle the appellants to acquittal.

12. It is a pity that for the failure of the prosecution to comply with the abovesaid provisions, the acquittal in such cases is warranted. This was a case where 8 persons with various packages of smack were arrested. No public witness was taken nor produced. The incident has taken place in front of the road. At the time of their arrest, a large number of persons must have been present. The search could have been taken in their presence easily but there is complete lack of any attempt or effort on the part of the prosecution to do so. The public witnesses of the incident were tried to be collected from amongst the passers-by of the road while they were proceeding to the spot. Once the policemen are on the truck and the vehicle is on the move it is not possible, in the circumstances, to call any person to accompany them to witness. This exhibits lack of sincerity on the part of the officer who proceeded to effect the arrests. In the circumstances the police party had not made any attempt to procure the public witnesses. The entire manner in which search and seizure of the accused was conducted by the police is deplorable. No effort whatsoever was made by the police party to know from these arrested accused persons about source of their procurement of this large quantity of smack. No effort to arrest any purchaser is also a serious lacuna that adversely affects the proceedings.

13. The result, therefore, is that the conviction of these appellants cannot be

affirmed by this Court. The appeals, therefore, are allowed. The conviction and sentence passed against the appellants is hereby set aside. They are acquitted of the offence on a technical lapse on the part of the prosecution. They need not surrender. Their bail bonds are cancelled and sureties are discharged.