
(2011) 07 DEL CK 0226
In the Delhi High Court
Case No : Criminal Appeal No. 700 of 2005

Bijay

APPELLANT

Vs

The State (G.N.C.T. of Delhi)

RESPONDENT

Date of Decision : 05-07-2011

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 428
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 20, 50, 57, 61

Citation : (2011) 6 AD 562 : (2011) 6 ILR Delhi 515

Hon'ble Judges : Suresh Kait, J

Bench : Single Bench

Advocate : Rajesh Mahajan, for Amicus Curiae, for the Appellant; Arvind K. Gupta, APP, for the Respondent

Final Decision : Allowed

Judgement

Suresh Kait, J.—The instant appeal is filed by the Appellant against the judgment dated 22.03.2005 whereby the Appellant was convicted u/s 20 of Narcotic Drugs and Psychotropic Substances Act, 1985 and by order dated 06.04.2005, the Appellant was sentenced to undergo RI for 10 years and to pay a fine of Rs. 1 lac. In default of payment of fine, the convict shall further undergo RI for 6 months. The benefit of Section 428 Code of Criminal Procedure was also given.

2. In spite of several efforts made, this Court is handicapped since the Trial Court are not available. Vide order dated 05.07.2010, the registry had been directed by this Court to reconstruct the records of the Trial Court. In further order dated 10.09.2010, registry was directed to place on record whatever papers it has received in the matter during reconstruction of file. Vide order dated 22.09.2010, learned Counsel for the accused at Trial Court was directed to be contacted but till date nothing concrete has been found in the matter. Therefore, in the absence of complete records of the Trial Court, I am proceeding with the matter.

3. Mr. Rajesh Mahajan, learned Counsel who has been appointed as amicus in

this matter by Delhi High Court Legal Services Committee is also handicapped in the absence of the complete records of the Trial Court. However, he is ready with the case on merits.

4. The case of the prosecution in brief is that on 03.03.2003 PW-10 SI Braham Pal Singh along with PW-6 HC Ayaj Khan and PW-7 HC Ram Avtar was on patrolling and present at platform No. 3-5 Old Delhi Railway Station. At about 09:10 pm secret information was received by the SI that one person was sitting on black colour iron box near staircase of flyover and Ganja was inside the said box.

5. This information was conveyed to 4/5 passerby by PW-10 SI Braham Pal Singh, they were requested to join the investigation but they refused and left without disclosing their names and addresses. A raiding party consisting of police officials was organized and they proceeded towards the place where accused was sitting on a black colour iron box and the secret informer pointed towards the accused. On seeing the police the accused tried to slip away with the iron box, but he was stopped by the PW-10 SI Braham Pal Singh.

6. The said SI conveyed the secret information to the accused and he again requested public persons to join them. On his instance one public person by the name of Khalil Khan PW-5 joined the police party. In the meantime, PW- 4 Insp. Jai Kishan, SHO police station RMD also reached the spot.

7. SI Braham Pal PW-10 Singh told the accused that search of the iron box and of his person is to be conducted and it is his legal right that search of the iron box can be conducted before a magistrate or a gazetted officer or they can be called at the spot. Accordingly, notice u/s 50 of Narcotic Drugs and Psychotropic Substances Act, 1985 was given to the accused. Accused declined the offer of search before a magistrate or a gazetted officer, accordingly, his reply was noted down on the notice. SI also offered the search of the members of raiding party to the accused but he declined. Even then PW-10 SI Braham Pal Singh gave his search to PW-5 Khalil Khan but No. contraband was recovered from his search.

8. PW-10 SI Braham Pal Singh directed the accused to take out the keys of the box from the pocket of his pant and opened the box. On opening, Ganja was found inside the said box. The Ganja was taken out of the box and on weighing it came out to be 30 kgs., out of which 1 kg. was separated as sample. After completing the formalities under the Narcotic Drugs and Psychotropic Substances Act, 1985, the said SI prepared the ruqqa and sent the same to the police station for registration of the case.

9. Accordingly, FIR bearing No. 106/2003 was registered at police station RMD, New Delhi. After completion of investigation, challan u/s 20/61/85 Narcotic Drugs and Psychotropic Substances Act, 1985 was prepared and filed in the court.

10. The Trial Court framed the charged against the accused vide order dated 06.08.2003 u/s 20 Narcotic Drugs and Psychotropic Substances Act, 1985 to

which accused pleaded not guilty and claimed trial.

11. The prosecution has examined as many as 11 witnesses but the accused has not produced any defence witnesses in spite of opportunity given.

12. Since there is No. record of evidences on record, therefore, there is No. purpose to discuss the deposition of the witnesses.

13. Learned Amicus Curiae submits that u/s 50 of Narcotic Drugs and Psychotropic Substances Act, 1985, notice had to be issued in advance since on the secret information, the police had to search the person of the accused and his belongings. However, in this case Section 50 of Narcotic Drugs and Psychotropic Substances Act, 1985 has not been fully complied with. Though the police has issued notice thereafter, as alleged he declined the same.

14. The Trial Court has come to the conclusion that notice u/s 50 of Narcotic Drugs and Psychotropic Substances Act, 1985 was not required since the recovery was not effected from the person of the accused but was effected from the iron box which he was carrying.

15. Further, learned Amicus Curiae points out the para 20 of the judgement wherein PW-5 Khalil Khan, an independent witness who participated in search and recovery proceedings has stated that the police officials were requesting the public persons to join them whereby PW-5 willingly joined the police officials. The police officials also told PW-5 that they have received information about Ganja in an iron box of black colour at the spot. He further pointed out that some documents were also given to the accused in writing and police officials also told the accused that if he wants, a gazetted officer can be called at the spot to which the accused declined the said offer.

16. Learned Amicus Curiae further submits that, the police officials were duty bound as per statute to give absolute right to the accused i.e. either to call the magistrate or a gazetted officer but in the present case, it was just a mere formality as the person apprehended was only given the option of gazetted officer. The other option is missing as per the deposition of PW-5, Khalil Khan, therefore, the statutory provisions were not complied in its letter and spirit.

17. PW-4 Insp. Jai Kishan and SHO concerned reached at the spot and joined the investigation. They found 30 kgs. of Ganja from the spot out of which 1 kg. was separated for sample purpose. The same was sealed with "BPS" and "JK" and sent to the malkhana. The report as required u/s 57 of the Narcotic Drugs and Psychotropic Substances Act, 1985 was prepared and sent to the ACP. It is submitted by learned Counsel that vide letter dated 17.04.2003, the sample was sent to the FSL, Malviya Nagar, New Delhi, whereas, the sample was deposited on 21.04.2003 to the FSL.

18. Learned Amicus Curiae has drawn the attention of this Court towards the FSL report dated 03.06.2003 in respect of receipt of parcel dated 21.04.2003 containing one cloth parcel sealed with the seals of "JK" and "BPS". It is found to

contain exhibit-"1" kept in a polythene bag. (Exhibit-"1") Dark greenish brown coloured dried plant material consisting of dried leaves, seeds and twigs stated to be "Ganja" weight approx. 910.7 gMs. with polythene.). On chemical examination, exhibit-"1" was found to contain Tetrahydrocannabinol which is main constituents of Cannabis Plant. However, as per the report dated 03.06.2003 in respect of receipt of parcel dated 12.05.2003, the weight of exhibit-"1" was found 619.0 gms of dried, greenish, brownish, flowery vegetative material along with seeds described as "Ganja".

19. Learned Amicus Curiae has pointed out that initially the sample was taken of 1 kg. of Ganja, whereas, the weight reduced to 910.7 gMs. and there is No. explanation given by the prosecution as to how the weight of the Ganja was reduced to this extent. It creates suspicion whether the FSL report is on the same sample as was sent by the police.

20. Learned Amicus Curiae further submits that the "FSL Form" was to be sent alongwith the sealed parcel of the sample of Ganja. Further he states that there was some interpolation in the Malkhana Register which is called as "Store Room Register" (part-I) against entry No. 91 wherein he noted that the words "And FSL Form" were subsequently added. Therefore, it proves that the FSL Form was not sent alongwith the sample taken. The Road Certificate dated 21.04.2003 also does not indicate any "FSL Form". Therefore, it further proves that No. FSL Form was sent along with sealed sample.

21. Learned Amicus Curiae further submits that while passing the judgment, learned Trial Court has not considered the deposition in cross-examination. He submits that in the instant case, the Trial Judge has not discussed anywhere throughout the judgment about the cross-examination being done by the counsel for the accused. Though the judgment only indicates that there was some cross-examination being done by the learned Counsel for the accused.

22. Learned Amicus Curiae had relied upon the judgment of Radha Kishan v. State 87 (2000) DLT 106 wherein in para 26 it was discussed that it is the normal procedure that when the incriminating articles are seized and are required to be sent to the CFSL, those articles are immediately sealed and deposited in malkhana at the police station till they are taken out and sent to the laboratory. However, in the instant case, this was not done. Contemporaneously with seizure and sealing of such articles, impression of seal used on sealed articles is put on a form, commonly called the "CFSL Form". This is being done so because at the time of analysis of sealed parcels in laboratory, the analyst concerned is able to tally the seal impressions on sealed packets with those appearing on the "CFSL Form" in order to rule out any possibility of tampering of seals or sealed packets after seizure, anywhere or in-transit, till receipt in laboratory. This is a safeguard to an accused to ensure that No. tampering has been done.

23. In para 29 of this judgment of Radha Kishan (supra), it was observed that in

a large number of NDPS cases the prosecution has to establish that the "CFSL Form" should be deposited in malkhana and thereafter be sent to the CFSL along with the seized sample; otherwise there is a strong possibility of tampering with the seals of samples sent to CFSL.

24. Further, learned Amicus Curiae relied upon the judgement of Mool Chand Vs. State, wherein in para 3, the main contention on behalf of the Appellant was that the "CFSL Form" although allegedly filled up at the spot, neither was deposited in the malkhana nor was it sent to the CFSL alongwith the sample and thus the very recovery of the opium becomes doubtful.

In the present case also, learned Counsel has taken the same stand that the "FSL Form" was neither sent nor produced or proved in the Court.

25. Learned Amicus Curiae further points out that the sample on 17.04.2003 was made ready to deposit at FSL, Malviya Nagar, New Delhi, however, the sample reached there on 21.04.2003 as indicates by the Road Certificate dated 21.04.2003. This fact has been proved by PW-1, HC Kunji Lal. This gap of period creates suspicion on the samples, whether it remained intact or tampered with. Even as per the chargesheet, Ex. PW- the sample was sent on 17.04.2003 vide R/ C No. 12/21 to FSL Malviya Nagar, New Delhi.

26. On the other hand, learned Counsel for the Respondent submits that the "FSL Form" is not to be proved but only the report of FSL has to be proved, therefore, the issue in the present case on the FSL Form has No. relevance at all. Therefore, the argument of learned Amicus Curiae has to be discarded.

27. Learned Counsel for the Respondent has further pointed out that it is recorded in Store Room Register (part-I) that the result of FSL was deposited at malkhana on 06.06.2003, after the report came back alongwith the "CFSL Form".

28. On perusal of the said store room Register, I found that there is No. mention of "FSL Form" and therefore, there is No. force in the statement of learned Counsel for the Respondent. This issue has already been dealt in the case of Balban Singh v. State decided on 05.05.2009 in Criminal Appeal No. 921/2005, in which the Court has observed on the issues of inter-collision, variation, delay, interpolation as under:

8. Mr. Mahajan is also right in pointing out that in the road certificate (Exhibit PW 3/B at page 107 of the trial court record), the words "& F.S.L. form" appear to have been added later to the line "one pulanda of cloth sealed with seal of LSY & HSY containing 1 kg ganja." The endorsement on its reverse signed by Constable Jitender Singh reads: "Retained one sealed cloth parcel in chemistry (sic chemical) division." There is No. mention of any FSL form. The date under the signature of the person preparing the Road certificate reads 18th September 2002 whereas the endorsement of the person receiving it is dated 13th September 2002. This is yet another unexplained anomaly. In the cross-examination of PW-3, a suggestion was put that No. FSL form was prepared and

sent with the sample, which was of course denied by the witness. These factors taken collectively lead to the conclusion that the prosecution has failed to prove the preparation and dispatch of the FSL form with the sample for testing."

Para 9 and 10 of the judgment in the case of Balban Singh (*supra*) deals on the issue of the importance of ensuring the FSL form duly signed, which reads as under:

9. In *Radha Kishan v. State* (*supra*), this Court has explained the importance of ensuring that the FSL form is duly sent with the sample for testing. IN para 26 of the said judgment, it was explained:

26. It is normal procedure that when the incriminating articles are seized and are required to be sent to the Central forensic Science laboratory, those articles are immediately sealed and deposited at the Malkhana at the police station till they are taken out and sent to the Laboratory. In the instant case, this was not done. Contemporaneously with seizure and sealing of such articles, impression of seal used on the seal is put on a form, commonly called, the CFSL form. This is so done because at the time of analysis of sealed packets in the laboratory, the analyst concerned is able to tally seal impressions on sealed packets with those appearing on the CFSL form in order to rule out any possibility of tampering of tampering of seals on sealed packets after seizure anywhere or in transit till receipt in laboratory. The importance of the CFSL form thus cannot be overemphasized because this document provides a valuable safeguard to an accused to ensure that No. tampering has been done during intervening period. The CFSL form is a document or forwarding note accompanying a sample sent by the police to the Forensic Science Laboratory. Such a form contains the nature of the crime, list of samples being sent for examination, nature of examination required and specimen of the seal/seals affixed on the exhibit besides particulars of the case/ police station.

(emphasis supplied)

10. In *Radha Kishan*, after referring to the Delhi High Court Rules, Part III Chapter 18 B, regarding proper proof of custody of articles, it was held by this Court that the evidence of preparation and dispatch of the FSL form was critical for ensuring that the sealed sample was kept intact in the police malkhana. An adverse inference would be drawn against the prosecution in the event the FSL form was not proved to have been prepared and dispatched. To the same effect are the judgments in *Moolchand* and *Phool Kumar*. Further, it has been held in *Satinder Singh Vs. The State* (National Capital Territory of Delhi), that oral evidence which is contrary to the documentary evidence ought not to be relied upon. In the instant case, despite the prosecution witnesses asserting that the FSL form was prepared, not only is the FSL form unavailable on the record but the photocopies of the store room register and road certificate throw considerable doubts whether the FSL form was in fact prepared and dispatched. These documents are unreliable. For the above reasons, it is held that in the

instant case the non-compliance with the mandatory requirement of preparation and dispatch of the FSL form with the sample sent for testing is fatal to the case of the prosecution.

Para 11 of the said judgment deals with the issue of seal to be handed over to an independent witness which reads as under:

11. It was next submitted by Mr. Mahajan that where there is an independent witness to the arrest and search, in the person of PW6, the seal used by the police officer to seal the pulandas containing the seized material and sample must be handed over to such the independent witness. On the contrary, Head Constable Ayaj Khan PW-4 states that "seal after use was handed over to me ... I took the rukka to Police Station along with from box, sealed parcel, form FSL and copy of seizure memo." SI Lal Sahib also confirms that "seal after use is handed over to SI Ayaj Khan." The law in this regard has been explained by the Supreme Court in *Rajesh Jagdamba Avasthi Vs. State of Goa*, where in para 15, it was observed: (SCC, p. 778) "15. This is not all. We find from the evidence of PW-4 that he had taken the seal from PSI Thorat and after preparing the seizure report, panchnama etc. he carried both the packets to the police station and handed over the packets as well as the seal to Inspector Yadav. According to him on the next day, he took back the packets from the police station and sent them to PW-3 Manohar Joshi, Scientific Assistant in the Crime Branch, who forwarded the same to PW-1 for chemical analysis. In these circumstances there is justification for the argument that since the seal as well as the packets were in the custody of the same person, there was every possibility of the seized substance being tampered with, and that is the only hypothesis on which the discrepancy in weight can be explained. The least that can be said in the facts of the case is that there is serious doubt about the truthfulness of the prosecution case.

(emphasis supplied)

Para 13 of the judgment deals with the issue of the sample being seen late for deciding to FSL and reads as under:

13. The next submission concerned the delay of over a month and a half in sending the seized sample for testing to the FSL. The seizure was made on 22nd July 2002 and the sample was sent for testing on 13th September 2002. The Supreme Court has in *Valsala Vs. State of Kerala*, and later in *State of Gujarat v. Ismail U Haji Patel* : (2003) 12 SCC 29 held that the delay per se would not be material. What had to be established was that the seized articles were in proper custody and in the proper form and that the sample sent to the Chemical Analyst for testing was the same that was seized.

Para 15 of the judgment deals with the issue of seal to be handed over to an independent witness, and reads as under:

15. The further submission was that PW-6 Ramesh Chand was in fact a stock

witness for the prosecution. It is seen from the cross-examination of PW-6 that "he had appeared as a witness once, in a narcotics case." He further stated: "he appeared as witness in some other drug case about one year back." In Rajesh Jagdambha Avasthi, among other grounds, the acquittal of the accused was based on the ground that one of the panch witnesses was a stock witness. It was observed (SCC, p. 778)

16. There is one other aspect of the matter. PW-2, the panch witness associated in this case appears to be a stock witness. The other panch witness has not been examined. PW-2 admitted in very clear terms that he was earlier associated in two other cases under the Narcotic Drugs and Psychotropic Substances Act, 1985 as panch witness. In both those cases, PSI Thorat was the Investigating Officer. On 14.12.1994 he had been summoned by PSI Thorat and acted as a panch witness in the case against P.C. Kulbi, who as noticed earlier disclosed the complicity of the Appellant. Thereafter, in the instant case, he was requested by PW-4 to act as a panch witness. It appears that PSI Thorat was also associated with this case as he was present with PW-4 when PC Kulbi was apprehended and thereafter when the Appellant herein was apprehended and searched at the instance of the aforesaid Kulbi.

29. At the end, learned Counsel for the Respondent feels handicapped in the absence of the Trial Court records, therefore, he has not argued further.

30. I have heard both the parties. The notice u/s 50 of the Narcotic Drugs and Psychotropic Substances Act, 1985 was not properly given as the Investigating Authority was supposed to give him both the option of a Gazetted Officer or a Magistrate as is provided in the act which the Investigating Authority has failed in the instant case which is supported by PW5 Khalil Khan who stated that police official told the accused that if he wants a gazetted officer, can be called at the spot to which the accused declined the said offer.

31. As regard the question of "FSL Form" is concerned, it has been proved from the above discussion that it was never sent to the FSL Malviya Nagar and not proved in the Court also. By not sending the FSL Form along with the samples make the samples doubtful.

32. The sample of Ganja was taken of 1 Kg, whereas the weight was found to be 910.7 grams and there is No. explanation as to how the weight of the Ganja was reduced, this also creates doubt on the sample. The Investigating Officer interpolated Malkhana Register and mentioned and "FSL Form" which proves that the Police Officer never sent the FSL Form along with samples.

33. After sealing the samples, the seal was not handed over to an independent person, rather he kept with him only, which also creates doubt on the sample whether the samples, were intact and not tempered with.

34. I have perused the nominal roll dated 04.02.2010. The Appellant has already undergone 6 years 10 months and 29 days and the unexpired portion of

sentence is only 3 years 1 months and one day (IFP).

35. Putting the curtain down, in the above said facts and circumstances of the case, the judgment dated 22.03.2005 and the order dated 06.04.2005, whereby he was sentenced to RI for ten years and to pay a fine of Rs. 1 Lac, is set aside.

36. Criminal Appeal No. 700/2005 is accordingly allowed and the Appellant is acquitted from all the charges and he shall be released forthwith. His personal Bond and surety bond are cancelled.