
(2006) 03 P&H CK 0025

In the Punjab And Haryana At Chandigarh

Case No : Criminal Appeal No. 691-SB of 1995

Hukam Singh

APPELLANT

Vs

State of Haryana

RESPONDENT

Date of Decision : 08-03-2006

Acts Referred:

Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 15

Citation : (2006) 17 CriminalCC 858

Hon'ble Judges : Virender Singh, J

Bench : Single Bench

Advocate : Upasana Gupta, for the Appellant; Sunil Katyal, DAG, for the Respondent

Final Decision : Allowed

Judgement

Virender Singh, J.—Appellant Hukam Singh suffered conviction u/s 15 of the Narcotic Drugs and Psychotropic Substances Act (for short the "Act") vide impugned judgment of learned Additional Sessions Judge, Bhiwani dated 23/24.8.1995. He was sentenced to undergo rigorous imprisonment for 10 years and to pay a fine of Rs. one lac, in default thereof to further undergo RI for six months. He preferred an appeal in this Court, which was registered as Criminal Appeal No. 691-SB of 1995. The same was allowed vide judgment dated February 4, 1999.

2. The State of Haryana preferred an appeal against the aforesaid judgment of acquittal in the Hon'ble Supreme Court and the same was registered as Criminal Appeal No. 649 of 1999. While allowing the State appeal, the Hon'ble Apex Court has remanded the instant appeal to this Court for fresh consideration in accordance with law and the appellant was directed to surrender before this Court, pursuant to which the appellant surrendered before this Court on 15.2.2006 and is presently confined in jail.

3. Since the appellant was not in a position to engage a counsel, the office was

directed to appoint some Advocate from the Haryana Legal Services Authority. Ms. Upasana Gupta has now appeared as Amicus Curiae to assist this Court.

4. The allegation against the appellant is that on 20.2.1994 at about 9.30/10.00 a.m. he was found in conscious possession of 20 Kgs. of poppy husk when apprehended by SI Maya Ram (PW-3) at railway crossing, Pilani Road, Loharu. Sh. S.N. Kaushik, DSP (PW-2) was also present there besides other police officials, accompanying SI Maya Ram. On completion of investigation he was put to trial for the charge of Section 15 of the Act.

5. The prosecution in order to prove its case has examined as many as 4 witnesses. Three main witnesses to recovery are DSP S.N. Kaushik (PW-2), SI Maya Ram, the Investigating Officer (PW-3) and HC Ashok Kumar (PW-4). ASI Raghunath Singh (PW-1) is a witness of formal character, who had simply recorded the FIR after receipt of ruqqa from the spot. The prosecution has also tendered into evidence the affidavit of Constable Anoop Singh (Ex. PD) and that of HC Dhram Singh (Ex. PE) besides the report of Chemical Examiner (Ex. PF). SI Amrik Singh at that time was in charge of police station Loharu, was given up as unnecessary.

6. The stand taken up by the appellant as emerges from his statement recorded u/s 313 of the Code of Criminal Procedure is of false implication. He asserts that he was taken to the police station to project him as a witness against one Krishna, but ultimately he was implicated in this case. In order to strengthen his case, he has examined Babu Lal Sharma, Station Superintendent Loharu (DW-1) and Mahabir Parshad, Gateman at Loharu Pilani Phatak (PW-2).

7. I have heard learned counsel for both the sides and with their assistance, gone through the impugned judgment very minutely.

8. Before discussing the evidence in detail, it would be pertinent to mention here that the appellant was acquitted by this Court in his Criminal Appeal No. 691-SB of 1995 primarily on the ground that there was non-compliance of Section 50 of the Act. The Hon'ble Supreme Court while setting aside the judgment of acquittal and remanding the case to this Court has observed as under :-

..... The appeal preferred by the respondent was allowed on this sole ground and certainly respondent must have other contentions against his conviction and sentence. The article seized from the appellant was "Chura" (poppy straw) and its weight was 20 Kgs., but it was less than the commercial quantity.

In the result, we set aside the judgment of the learned Single Judge and the matter is remanded to the High Court for fresh consideration in accordance with law.....

9. Ms. Gupta submits that although the appellant cannot develop his case on the point of Section 50 of the Act, yet the prosecution has not been able to prove its case against him beyond shadow of reasonable doubt as it suffers from certain other vital infirmities. She asserts that the case of the prosecution hinges upon

the testimony of police officials alone and no effort was made by SI Maya Ram to join any independent witness when there was no dearth of it. Even the statements of the official witnesses are full of material discrepancies and while reading over the statements of witnesses, the learned counsel submits that the case of the prosecution is not free from doubts.

10. The next argument advanced by Ms. Gupta is regarding missing of link evidence in this case. Dwelling upon her arguments, she submits that there is discrepancy with regard to affixing of seals of "SN" (of DSP SN Kaushik) and of "AS" (of Amrik Singh) and from this, the learned counsel wants to develop that the possibility of tampering with the sample cannot be ruled out. The learned counsel then contends that the case property is not sealed with any seal of SI Maya Ram and the seal used by DSP was also handed over to HC Ashok Kumar, who throughout remained with the Investigating Officer. SHO Amrik Singh has also not been produced to show the compliance of Section 55 of the Act. This is again a vital weakness in the case of the prosecution.

11. The learned counsel in order to demolish the case of the prosecution yet from another angle, contends, that the case property was deposited with MHC Dharam Singh on 20.2.1994 as is evident from his affidavit (Ex. PE) and the same was handed over to Constable Anoop Singh on 2.3.1994 for taking it to the office of Forensic Science Laboratory, whereas the report of Forensic Science Laboratory indicates that the forwarding letter was prepared on 28.2.1994. For the purpose of preparing the forwarding letter in the office of Deputy Superintendent of Police, the case property must have been taken out of Malkhana and if it is so, in that eventuality there should have been some link evidence to prove that it was re-deposited in the Malkhana and then taken out on 2.3.1994 for sending it for analysis. The prosecution is silent about this fact and according to the learned counsel this is a material infirmity, which creates suspicion.

12. The learned counsel then submits that there is a delay in sending the sample to the Chemical Examiner, which fact also creates a doubt in the prosecution case and when all these flaws are taken into account collectively, the same lead to an irresistible conclusion that it is not free from doubt. In support of her submissions, the learned counsel has placed reliance upon the judgment of this Court rendered in *Paramjeet Singh v. State of Haryana*, 2005 (3) RCR 321.

13. Another attack launched by the learned counsel is that Constable Anoop Singh has not stepped into the witness box for cross-examination and even the affidavits of Constable Anoop Singh and HC Dharam Singh were not put to the appellant at the time of recording his statement u/s 313 Cr.P.C., which again is a serious infirmity. In support of her contention, she relies upon the judgments of this Court rendered in *Kapil Dev v. State of Punjab*, 2004 (2) RCR (Crl.) 275 and *Baldev Singh v. State of Punjab*, 2004 (3) RCR 262.

14. On the basis of the aforesaid submissions, the Learned counsel submits that

the appellant deserves acquittal.

15. The learned State counsel while controverting the arguments advanced by Ms. Gupta submits that there is no reason to disbelieve the official witnesses when one of them is a senior Police officer of the rank of Deputy Superintendent of Police. He then submits that for the purposes of sealing the sample, the seal of DSP S.N. Kaushik has been used and there cannot be any chance of tampering with the seal at any stage. He then submits that may be ASI Maya Ram the Investigating Officer had not joined any independent witness but that by itself cannot be a ground to dislodge the case of the prosecution when the statements of the official witnesses do not suffer from any basic infirmity. The learned State counsel, therefore, prays for affirmation of the conviction.

16. After hearing the rival contentions of either side and going through the entire record very minutely, I am of the considered view that the prosecution has not been able to prove the conscious possession of the contraband qua the appellant beyond any shadow of reasonable doubt and as such he deserves acquittal. The reasons for arriving at the said conclusion are detailed as under :

17. The place from where the recovery is allegedly effected, is a public place as is evident from the statement of HC Ashok Kumar. Mahabir Parshad (DW-2) is the gateman on duty on 20.2.1994 from 8.00 a.m. to 8.00 p.m., who deposed that in his presence nothing was recovered from the appellant. The presence of Mahabir Parshad is proved by the documentary evidence through Babu Lal Sharma, Station Superintendent, Loharu (DW-1). This shows that the Investigating Officer has not made any effort to join the independent witness to give sanctity to the search. No doubt, I am not acquitting the appellant simply on the ground of non-joining of the independent witness despite availability, but on account of other infirmities as well, which in my view are very vital.

18. In order to prove the recovery of contraband in this case, the prosecution has examined three witnesses viz. DSP S.N. Kaushik (PW-2), SI Maya Ram (PW-3) and HC Ashok Kumar (PW-4). DSP S.N. Kaushik (PW-2) has deposed that the sample and the residue were sealed with the seal bearing the impression "SN". He, however, does not talk about the number of seals affixed on the sample or the residue. Another fact disclosed by this witness is that the seal after use was entrusted to HC Ashok Kumar. SI Maya Ram when stepped into the witness box states that 3 seals of DSP and 3 seals of the SHO were put on the sample in his presence. So is the position with regard to the remainder. HC Ashok Kumar is not aware of the number of seals put on the sample or the residue. As per report of Forensic Science Laboratory (Ex. PF), the description of the parcel indicates that there were 3 seals of "SN" and two seals of "AS". This shows that the Investigating Officer is not depicting a true picture before us. This Court would have ignored this discrepancy, had Amrik Singh SHO of the concerned police station stepped into the witness box to show the compliance of the provisions of Section 55 of the Act. He is, however, given up as unnecessary for the reasons best known to the prosecution. The matter does not rest here.

Even in the affidavit (Ex. PD) tendered by Constable Anoop Singh, it is averred that the sample was sealed with the seal bearing inscription "AS" and "NS". He does not talk about any seal having the inscription "SN". "NS" does not stand for DSP S.N. Kaushik (PW-2), who in his cross-examination makes it clear that he is having two seals only i.e. one with inscription "SN" and another with "SNK". This ambiguity remains unexplained by the prosecution. The interesting part is that aforesaid Constable Anoop Singh, who had taken the sample to the Chemical Examiner, is not examined to clarify this ambiguity. His affidavit was only tendered on the statement of the Public Prosecutor.

19. I am doubting the case of the prosecution yet from another angle as well. The report of Forensic Science Laboratory indicates that the forwarding memo number 100-DSP/L is dated 28.2.1994 and the parcel is dispatched vide RC-85 on 2.3.1994 through Constable Anoop Singh. It reached the hands of the concerned official of the Forensic Science Laboratory, Haryana, Madhuban, Karnal on the same day. This shows that when the forwarding memo was prepared in the office on 28.2.1994, the sealed parcel was not shown to the concerned official (senior police official) and it is a sheer formality. The admitted position as emerging from the affidavits of Constable Anoop Singh and HC Dharam Singh-incharge of the Malkhana is that the sample and the case property were initially deposited on 20.2.1994 by SI Maya Ram with HC Dharam Singh and the sample was taken out on 2.3.1994 for depositing in the office of the Forensic Science Laboratory. Who got the forwarding memo prepared, is again a question to be answered by the prosecution. Anoop Singh is silent about it in his affidavit. SI Maya Ram or even DSP S.N. Kaushik in their statements on oath do not say a word about it. The Forensic Science Laboratory report indicates that it is from the office of DSP Loharu. All these ambiguities in the prosecution cannot be just brushed aside and it creates doubt in the genuineness of the investigation.

20. With regard to the compliance of Section 55 of the Act, the prosecution case is that the case property, the accused and the witnesses (except DSP S.N. Kaushik) were produced before SI/SHO Amrik Singh, who after verifying the facts had put his seals. SI Maya Ram does not utter a word that SHO Amrik Singh had kept the sample and the case property with him in his custody. He simply states in his examination-in-chief that after SI Amrik Singh had put his three seals each on the samples and the residue and then the case property was deposited with the MHC, Malkhana. The requirement of Section 55 of the Act is that it is the duty of the SHO to keep the case property in safe custody pending orders of the Magistrate. SI Maya Ram does not say a word that SI Amrik Singh had given him the direction to deposit the case property with the MHC. This position could be made clear by SI/SHO Amrik Singh, but as stated above, he was given up as unnecessary. No doubt, the provisions of Sections 52, 55 and 57 of the Act are directory in nature and violation thereof would not ipso facto violate the trial or conviction but the failure of the prosecution to bring on record the compliance of these sections can certainly be taken into account coupled with the other infirmities in the case of the prosecution and in that eventuality, it

would not be safe to convict the accused. The judgment in Paramjeet's case (supra) relied upon by learned counsel for the appellant squarely covers the case of the appellant.

21. The learned counsel for the appellant while relying upon the two decisions of this Court rendered in Kapil Dev's case (supra) and Baldev Singh's case (supra) states that Constable Anoop Singh was not produced in the witness box for the purposes of cross-examination and at the same time in order to prove the link evidence, affidavits of Constable Anoop Singh and HC Dharam Singh have not been put to the appellant in his statement recorded u/s 313 of the Code of Criminal Procedure and this omission touches the core. To be fair to the learned counsel, I may state here that first part of his submission is sustainable to some extent. The zimini order reflects that when affidavit of Constable Anoop Singh was tendered in Court, he was not present. No doubt, it is not the situation qua HC Dharam Singh.

22. So far as second limb of argument with regard to putting the aforesaid two affidavits to the appellant at the time of recording his statement u/s 313 of the Code of Criminal Procedure is concerned, the same has to be repelled in the light of the latest judgment of Hon'ble Apex Court rendered in State of Punjab Vs. Sawaran Singh, . Thus, the decisions in Kapil Dev's case (supra) and Baldev Singh's case (supra), do not advance the case of the appellant on one aspect at least, but cover the case of the appellant on the other point and this weakness certainly dents the case of the prosecution, inter alia, on other flaws discussed hereinabove.

23. Another flaw, worth noticing in this case is that seal of DSP (S.N. Kaushik), in whose presence the recovery was allegedly effected and only his seal was affixed on the sample and the residue remained with HC Ashok Kumar and this witness again remained throughout with SI Maya Ram, the Investigating Officer and had also come to the police station with the Investigating Officer. He does not say that the seal was returned to DSP S.N. Kaushik before the sample was sent to the Chemical Examiner. Even DSP S.N. Kaushik does not say a word that the seal was returned to him after the case property was deposited in the Malkhana of police station Loharu. From this, it can be inferred that the seal of the DSP remained under the control of the Investigating Officer till the sample reached the hands of the Chemical Examiner. When this weakness is seen in the light of the fact that the sample had reached the office of the Forensic Science Laboratory with two seals bearing inscription "AS" (for Amrik Singh) instead of 3 seals, chances of tampering with the sample or the residue cannot be ruled out. Once the investigation is doubted by this Court on vital points, it cannot be said with certainty that the prosecution has been able to prove the conscious possession of the appellant beyond any shadow of reasonable doubt. The recovery is effected before the amending provisions and, therefore, it does not fall under the head "non-commercial quantity", for which less punishment is provided. Stringent provisions regarding sentence are attracted in this case and,

therefore, this Court has to see that the prosecution case is flawless on all counts.

No other point has been urged before me.

Resultantly, while extending the benefit of doubt to the appellant, the impugned judgment of conviction and sentence is hereby set aside. The appellant is acquitted of the charge framed against him. He shall now be released forthwith, if not required in any other case.