

(2010) 09 MP CK 0069

In the Madhya Pradesh High Court

Case No : Criminal Appeal No. 1351 of 2006

Kishorilal and Devi Singh Rajput

APPELLANT

Vs

State of M.P. thro' P.S. Pandharinath

RESPONDENT

Date of Decision : 08-09-2010

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 374
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 20, 52A, 55, 8

Citation : (2011) ILR (MP) 498

Hon'ble Judges : I.S. Shrivastava, J

Bench : Single Bench

Final Decision : Allowed

Judgement

I.S. Shrivastava, J.—This appeal has been preferred u/s 374 of Cr.P.C. being aggrieved by the judgment dated 4.11.2006 passed by the Court of Shri Sanjiv Datta, Special Judge, (NDPS Act), Indore in Spl. Case No. 33/03 by which the appellants Kishorilal and Devisingh have been found guilty u/s 8/20(b)(ii)(C) of the N.D.P.S. Act (for short the Act) and sentenced to rigorous imprisonment of 10 years along with fine of Rs. 1,00,000/- (one lakh) to each and in default of payment of fine, to undergo further imprisonment for four months to each.

2. According to prosecution story Shri S.S. Bhadoriya ASI, Police Station, Pandharinath, Indore in the morning of 21.10.03 at 10.30 a.m. received an information from the informer that Kishorilal and Devisingh resident of Kullu Manali are standing near Taj Building with Cannabis (hemp) (Charas) and waiting for customer. The information was entered in the Rojnamcha. He prepared a Panchnama of the information of the informer and information was sent to C.S.P. Sarafa. He alongwith constable Sanjay, independent witnesses and force reached Mohanpura Taj building. They found two persons standing there. After verification of their names as Kishorilal and Devisingh they were apprised with the information of the informer and after obtaining their due consent for the search,

bag of Kishorilal was searched. In this bag in a polythene bag, 2 kg. 800 gms. of cannabis (hemp) (Charas) was found out of which 2 samples of 100 gms. each were prepared and sealed and marked as Articles A1, A2. Remaining quantity was sealed in a polythene bag and marked as Article A. All the packets were sealed and seized. Kishorilal was arrested. Devilal was also apprised of the information of the informer and after obtaining his consent for search, bag contained by him was searched in which in a polythene bag 2 kg. 500 gms. of cannabis (hemp) (Charas) was found out of which 2 samples of 100 gms. each were prepared and marked as Articles B1, B2 and remaining quantity was sealed in a polythene bag and marked as Article B. All the packets were sealed and seized. Devilal was arrested. The other Panchnamas were prepared and raid party returned to police station. The report was lodged at Crime No. 280/03. On interrogation Kishorilal informed that he has delivered one kg. Charas to Babulal Bagora. Memorandum of information was prepared and Babulal was searched. He was found standing before Raj Medical Store. After identification by Kishorilal, he was apprised with the information and after obtaining his due consent, one kg. Charas was found in a plastic bag; out of which 2 samples 100 gms. each were prepared and marked as Articles C1, C2 and remaining quantity was packed and marked as Article C. All the packets were sealed and seized on the spot. Babulal was arrested. Thereafter raid party returned to police station. Samples A1, B1, C1 were sent to FSL Indore by the report of which presence of Charas was confirmed. Hence after completion of investigation, challan was filed. After trial appellants have been convicted as mentioned above.

3. It has been argued on behalf of the appellants that the independent witnesses were hostile. They did not support prosecution case. Bulk quantity packets were not produced at the time of evidence. Only samples A2, B2, C2 and remnant samples A1, B1, C1 were produced at the time of evidence. Hence seizure of Charas was not proved by the evidence. There was non-compliance of Section 55 of the Act. Property was sent after two months to Court for which no explanation was given. Proceedings u/s 52A of Act was not proved. Appellants Kishorilal and Devising were in custody of police since night of 20.10.2003 and this news was published in the news paper "Agniban" on 21.10.2003. Hence appellants have been falsely implicated in the case. Hence appeal be allowed.

4. It has been argued on behalf of respondent that appellants have been rightly convicted on the basis of evidence produced before trial court for the heinous offence. Appeal being devoid of merits, be dismissed accordingly.

5. Considered the arguments. Record of trial court perused.

6. Shri S.S. Bhadoriya PW.1 seizing officer conducted the proceedings vide Panchnama Ex.P.9, P.12 to P.33 and P.43 to P.54. before independent witnesses Gordhan Soni PW.9 and Pradip Kumar Mishra PW.10. Gordhan Soni PW.9 has deposed that he does not know the accused persons. He does not know about the place. Police did not take any action before him. He never went to Mohanpura Taj building with police and Charas was not seized before him. The arrest was not

taken before him. He has denied his signature on Ex.P.9 and P.12 to P.33 and arrest memo Ex.P.43 to P.54. He has denied his police statement Ex.P.55. He has not supported step by step proceedings taken up by the seizing officer Shri S.S. Bhadoriya. In this way this witness has not supported prosecution case. The other independent witnesses Pradip Kumar (PW.10) after examination-in-chief of accused Babulal and after some cross examination from accused Kishorilal and Devising, after adjournment of the case, did not appear for further cross examination. Hence his statement is inadmissible in evidence. In this way seizure memo Ex.P.20 and Ex.P.31 and other Panchnamas were not proved by the independent witnesses.

7. As regards proceedings u/s 52A of the Act is concerned, no proceedings were taken up in this respect. Chhavinath Singh, head constable, PW.7 has deposed that he wrote a letter to the Executive Magistrate for the proceeding u/s 52A of the Act but he did not conduct any proceeding in this respect. In this way proceedings u/s 52A of the Act was not taken up at the pre-trial stage.

8. At the time of trial in evidence only samples A2, B2, C2 and remnant samples A1, B1, C1 were produced and bulk quantity packets A, B, C were not produced in evidence. Therefore, it can not be said that samples were prepared from the respective bulk quantity packets A, B, C. Therefore, in the light of law laid down by the Apex Court in the case of Ritesh Chakrawarti v. State of M.P. II (2006) ACR 362 and Bholaram Kushwaha v. State of M.P. 2001 (1) EFR 160 the seizure memo was not proved.

9. In the case of Jitendra and Another Vs. State of M.P., it has been held by the Apex Court that:

the evidence to prove that charas and ganja were recovered from the possession of accused consisted of the evidence of the police officers and the panch witnesses. The panch witnesses turned hostile. Thus, we find that apart from the testimony of Rajendra Pathak PW-7, Angad Singh PW-8 and sub-inspector D.J. Raj PW-6, there is no independent witness as to the recovery of the drugs from the possession of accused. The Charas and Ganja alleged to have been seized from the possession of the accused, were not even produced before the Trial Court, so as to connect it with the samples sent to the FSL. There is no material produced in the Trial apart from the interested testimony of police officers, to show that the Ganja and Charas were seized from the possession of the accused or that the samples sent to FSL which were taken from drugs seized from the possession of the accused.

In the Trial, it was necessary for the prosecution to establish by cogent evidence that the alleged quantities of Charas and Ganja were seized from the possession of accused. The best evidence would have been the seized materials, which ought to have been produced during the trial and marked as material objects. There is no explanation for this failure to produce them. Mere oral evidence as to their features and production of panchanama does not discharge the heavy

burden, which lies on the prosecution particularly where the offence is punishable with stringent sentence as under the NDPS Act.

10. Same view has been adopted in the cases of Abdul Gani Vs. State of M.P., Noor Aga v. State of Punjab AIR 2009 SC 852 and Laxminarayan Vs. State of M.P.,

11. Therefore, I conclude that seizure memo Ex.P.20 and Ex.P.31 were not proved at the time of evidence. Therefore, appellants were not liable to be convicted.

12. It has been argued that there was non compliance of Section 55 of the Act and property was sent to Court after two months and there is no explanation of this delay.

13. Considered the arguments. Chhavinath Singh head constable PW.7 was Malkhana Incharge at the relevant time. He has deposed that property was deposited in the Malkhana on 21.10.03 and it was sent to the Court on 27.12.03. In this way there was delay of 2 months and 6 days in sending property to the court for which no explanation has been submitted by him. He has further admitted in cross examination that in the Malkhana register Ex.P.39, there is no entry about the deposit of impression of seal and seal. In this way impression of seal and seal were not deposited in the Malkhana. According to provisions of Section 55 of the Act, at the time of deposit of property in the Malkhana, it shall be sealed with the personal seal of the Incharge of Police Station. In this respect Chhavinath Singh PW.7 head constable has deposed that he resealed the property before depositing it in Malkhana and prepared Panchnama Ex.P.36 and P.37. In this respect it has been argued that he has not deposed that it was sealed with the personal seal of the Incharge of Police Station. He himself has sealed the property while he was not a gazetted officer and Malkhana of the Police Station is not a double lock Malkhana. Therefore, proper custody of the property, was not proved.

14. Considered the arguments. Chhavinath Singh PW.7 has admitted in cross examination that in his police station there is no double lock system in the Malkhana. He has further deposed that he himself sealed the property and prepared Panchnamas Ex.P.36 and P.37 but in these Panchnamas it has been not mentioned that by which seal the property was resealed. He was not Incharge of Malkhana. In Ex.P.36 it has been mentioned that the property was produced by Shri S.S. Bhadoriya and in Ex.P.37 it has been mentioned that property was presented by Shri N.S.Jaden Incharge of the Police Station. Under this circumstance in Ex.P.36 the property was to be sealed with the personal seal of the Incharge of Malkhana and at the time of resealing vide Panchanama Ex.P.37 which was to be sealed by the officer next to the Incharge of Police Station who was Incharge of the Malkhana at that time, but this procedure has not been followed. The property has been resealed two times by Chhavir Nath Singh (PW.7). Therefore, resealing of the property as per rules, was not proved and the property was not deposited in the double lock Malkhana and this delay of 2

months and 6 days in sending the property to the court was not explained. Therefore, in view of the law laid down by the Apex Court in the case of Valsala Vs. State of Kerala, and in the case of Thandiram v. State of Haryana 2000 SCC (Cri) 189 appellants were not liable to be convicted.

15. It has been argued that appellants have been falsely implicated in this case. They were in custody of the police since 20.10.2003. Above property was seized from some other persons of Gujrat and the police just to save them, has falsely implicated the appellants in this case. In the news paper Agniban dated 21.10.2003 Ex.D.1, a news was published that since last night Kishorilal and Devisingh of Himachal Pradesh are in custody of the police. Hence they have been falsely implicated in this case. Respondent's counsel has argued in this respect that the paper news is not admissible in evidence.

16. Considered the arguments. According to prosecution case on 21.10.03 a Panchnama Ex.P.3 about the information of informer was prepared at 10.33 a.m. and raid party after intercepting the accused, prepared Panchnama Ex.P.12 at 11.35 a.m. with respect to Kishorilal and seized Charas from him at 12.40 p.m. vide seizure memo Ex.P.20. According to Panchnama Ex.P.23 Devisingh was apprised with the information of the informer at 13.10 p.m. and at 14.20 p.m. vide Ex.P.31 Charas was seized from him. FIR Ex.P.59 was lodged at 15.00 p.m. on 21.10.2003. This shows that the prosecution started the proceedings from 10.33 a.m. which was conducted till lodging of FIR at 15.00 p.m. on 21.10.03. The news paper Agniban Ex.D.1 dated 21.10.03 reveals that since last night accused Kishorilal and Devisingh residents of Himachal Pradesh have been in custody of the police. They came near Mohanpura Taj building to deliver Charas to Babulal and from all the three accused persons 5 kg. 450 gs. Charas has been seized. They were staying in a lodge near Krishnapura. Agniban is an evening times. In this respect Mahendra Bapna DW.1, city chief reporter of Agniban has deposed that the news published at page 12 of Agniban on 21.10.2003 in A-A portion relates to accused Kishorilal and Devisingh. This news was given to him by Santosh Singh Gaur, C.S.P. on telephone before 12.30 p.m. This paper was printed till 1.00 p.m. Therefore, from the evidence of this witness it is clear that this paper was published till 1.00 p.m. on 21.10.2003 which contained a news that Kishorilal and Devisingh were in custody of police since last night i.e. from 20.10.2003 with Charas. Shri S.S. Bhadoriya PW.1 and Shri Narsingh Yadav PW.4 in this respect have been cross examined about the news published in Agniban Ex.D.1 but they have not accepted the fact that appellants Kishorilal and Devisingh were in custody of the police. As per legal position about the news published in the news paper, it is not reliable because it is hearsay evidence. But in the case of N. Meera Rani Vs. Government of Tamil Nadu and Another, it has been held that "news paper reports indicating that the detenu was already in custody could at best be relevant only to show the fact that he was already in detention prior to the making of the detention order." Therefore, news published in the paper about the detention of the appellants was relevant in this respect and can not be disbelieved. Why a paper will publish a news about the detention

of a person baselessly when he is not in the custody of the police. After arrest or detention of a person in the custody it is always a news that such a person has been called to police station for arrest or taken into custody. Therefore, under the circumstances this news was not a such news which can be disbelieved the source of which was information from Shri Gaur C.S.P. Therefore, it creates a doubt about the genuineness of the case that when appellants were already in custody of the police since night of 20.10.2003 then how the proceedings were taken up on the information of the informer from 10.33 a.m. on 21.10.2003 to 15.00 p.m. on 21.10.2003. Under these circumstances all the proceedings taken up by the police in this respect are doubtful.

17. Therefore, on the basis of above discussion, I conclude that in this case, the seizure memo was not proved. Bulk quantity property was not produced at the time of evidence. Compliance of Section 55 of the Act was not proved. Proper custody of samples in the Malkhana of the Police Station was not proved. Proceedings taken up by the police was doubtful as appellants were in custody of police since night of 20.10.2003. Therefore, appellants were not liable to be convicted. Therefore, the appeal deserves to be allowed.

18. Hence on the basis of above discussion the appeal is allowed. Conviction of the appellants Kishorilal and Devising u/s 8/20(b)(2)(c) of the NDPS Act is hereby set aside. Appellants be released if not required in any other offence. Fine if deposited be returned to them.

19. Case was taken on court slip. Appellants' counsel submitted that by order dated 20.8.10 this case was listed after two weeks but it has not been listed. Therefore, by court slip case has been fixed today.

20. Arguing counsel Shri CR Joshi, is out sider counsel. Hence case was heard today.

21. Final arguments heard.

22. Judgment dictated in open court, signed and dated separated. Appeal is disposed of accordingly.