
(2001) 07 RAJ CK 0030
In the Rajasthan High Court
Case No : Criminal Appeal No. 529 of 1996

Mukesh and Others

APPELLANT

Vs

State of Rajasthan

RESPONDENT

Date of Decision : 26-07-2001

Acts Referred:

Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 21, 8

Citation : (2002) 2 RLW 1251 : (2002) 5 WLC 407 : (2002) 2 WLN 171

Hon'ble Judges : Sunil Kumar Garg, J

Bench : Single Bench

Advocate : Doonger Singh, for the Appellant; D.D. Kalla, Public Prosecutor, for the Respondent

Final Decision : Dismissed

Judgement

Garg, J.—This appeal has been filed by the accused appellants against the judgment and order dated 17.10.1996 passed by the learned Special Judge, NDPS Cases (Addl. Sessions Judge No.1), Chittorgarh in Sessions Case No. 66/96 by which he convicted both the accused appellants for the offence u/s 8/21 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as "the NDPS Act") and sentenced each of them to undergo twelve years R1 and to pay fine of Rs. two lacs in default of payment of fine, to further undergo two years" imprisonment.

2. By the same judgment, the learned Special Judge acquitted accused Rafique Mohd. of the charge for the offence u/s 8/21 of the NDPS Act and also acquitted accused Jamnesh and Intquab Khan of the charge for the offence u/s 8/29 of the NDPS Act, while the case against one accused Saleem Khan remained pending as he was declared absconder.

3. The facts giving rise to this appeal, in short, are as follows:-

On 17.6.1993 at about 10.00 AM, PW 6 Ashok Kumar, Excise Inspector, Chouti Sadri received a secret information to the effect that in between 2.00 PM to 4.00

PM, one Ambassador Car of blue colour bearing No. RJ 09-C-0104 having opium or brown sugar in it would pass through Nimbahera-Neemuch marg. This information was reduced into writing by PW6 Ashok Kumar and the fard of that is Ex. P/10 and through Ex.P/11, copy of that information was sent to the District Excise Officer, Chittorgarh. After receiving that information, PW6 Ashok Kumar alongwith raiding party reached on the spot and apart from them, PW5 Dwarka prasad, District Excise Officer and Sunil Bhandari, Inspector, Excise Department, Chittorgarh also reached on the spot. On the spot, an Ambassador Car of same colour and number, as disclosed in the secret information, came and it was stopped and two motbirs, namely, Lal Mohd. and Mishri Lal, PW3 were also called and as soon as the Car was stopped, it was found that two persons were sitting on the back seat and the Car was being driven by one accused Rafique and on being asked, the persons, who were sitting on back seat, told their names as Mukesh (accused appellant No. 1) and Orn Prakash (accused appellant No.2) and before making their search, notice Ex. P/12 u/s 50 of the NDPS Act was given to the accused appellants by PW6 Ashok Kumar asking them whether they wanted to be searched before the Magistrate or the Gazetted Officer and they gave their consent that they could be searched by PW6 Ashok Kumar. Thereafter, search was made by PW6 Ashok Kumar and on search, a ragsin bag of black colour was recovered, which was lying between the accused appellants and one side of that bag, Bombay Beauty Banian-Underwear and on other side, Citizen Banian-Underwear were printed, Thereafter, that bag was opened and on opening, in all six cloth packets of green colour were found and on opening these packets, brown colour powder was found and on seeing and checking, it was assessed that it was nothing, but brown sugar and on being asked, both accused appellants told that it was brown sugar. Thereafter, each packet was weighed and weight of the first bag was found to be 1 kg. 10 grms. and it was marked as "A" and thereafter, rest five packets were also weighed and weight of each packet was found to be 1kg. 35 grms. and they were marked as "B", "C", "D", "E" arid "F" respectively. Thereafter, heroin was taken out from each packet and it was weighted and net weight of heroin in packet "A" was found to be 975 grms. in packet "B" I kg., in packet "C1 1kg., in packel "D" 1kg., in packet "E" 1kg, and in packet T" 1 kg. and thus, the total weight of actual heroin of these six packets was found to be 5kg. 975 grms. and weight of each packet excluding heroin was found to be 35 grms. Thereafter, two samples of 5 grms. each were taken from each packet and they were sealed separately and rest heroin was also sealed on the spot. The two samples, which v/ere taken from each packet, were marked as AI-A2, B1-B2, C1-C2, D1- D2, E1-E2 and F1-F2 and rest packets were marked A,B,C,D,E and F respectively. The fard of search and seizure prepared by PW6 Ashok Kumar on the spot is Ex.P/3. The site plan, which was prepared on the spot by PW6 Ashok Kumar is Ex.P/4. The accused appellants Mukesh and Om Prakash were arrested through Ex.P/5 and Ex.P/6 respectively ;md through Ex.P/8, the Car carrying the heroin was seized and through Ex.P/16, information about search and seizure was sent by PW6 Ashok Kumar to the District Excise Officer, Chittorgarh and through Ex.P/17 information about search and seizure

was sent to the Addl. Commissioner (Admn.), Excise Department, Udaipur. All the seized articles were deposited in Malkhana Register is Ex.P/18. Vide letter Ex.P/21, samples AI, BI, CI, DI, EI and FI were sent to Chief Public Analyst, State/Central Public Health Laboratory, Rajasthan, Jaipur for the purpose of chemical examination through PW7 Mithalal and on 25.6.1993, rest articles were deposited by PW6 Ashok Kumar Mn the Treasury, Chittorgarh through letter Ex.P/22 and receipt of obtaining these articles from PW6 Ashok Kumar by! Treasury Officer was given on Ex.P/22. On 19.6.1993, further investigation of the case was handed over by PW6 Ashok Kumar to PW7 Mithalal. The report of the Chief Public Analyst, which was earlier given is Ex.P/27 and on further clarification through Ex.P/28, revised report was given by the Chief Public Analyst, State/Central Public Health Laboratory, Rajasthan, Jaipur and the same is Ex.P/29, in which it was stated as under:-

"The above mentioned samples of heroin marked AI, BI, CI, DI, EI and FI, on examination, are found to contain the following percent Morphine content (calculated as anhydrous morphine):-

(AI) 5.18 (BI) 5.47, (CI) 5.18, (DI) 5.18, (EI) 5.18 and (FI) 5.47"

After usual investigation, challan was submitted in the Court of Session, Pratapgarh for the offence under Sections 8/21 against the accused appellants Mukesh and Om Prakash and accused Rafique Mohd. and for the offence u/s 8/29 against accused Jamnesh, Intquab and Saleem Khan.

On 5.11.1993, the learned Sessions Judge, Pratapgarh framed charges against accused appellants Mukesh and Om Prakash and accused Rafique for the offence u/s 8/21 of the NDPS Act and against accused Jamnesh and others for the offence u/s 8/29 of the NDPS Act. The charges were read over and explained to the accused persons, who pleaded not guilty and claimed trial.

During trial, the prosecution in support of its case examined as many as 7 witnesses and got exhibited some documents. The statement of PW6 Ashok Kumar was recorded twice. Thereafter, statements of the accused persons u/s 313 Cr.P.C. were recorded. No evidence was produced in defence by the accused persons.

After conclusion of trial, the learned Special Judge, NDPS Cases, Chittorgarh through his judgment and order 17.10.1996 convicted and sentenced the accused appellants for the offence u/s 8/21 of the NDPS Act holding inter-alia that the prosecution has proved its case beyond all reasonable doubts against them for the offence u/s 8/21 of the NDPS Act. However, as already stated above, the learned Special Judge by the same judgment acquitted other accused Rafique of the charge for the offence u/s 8/21 of the NDPS Act and two other accused Jamnesh and Intquab Khan of the charge for the offence u/s 8/29 of the NDPS Act.

Aggrieved from the said judgment and order dated 17.10.1996 passed by the

learned Special Judge, NDPS Cases, Chittorgarh, this appeal has been filed by the accused appellants.

4. In this appeal, the following submissions have been made by the learned counsel for the accused appellants:-

1. That the statement of PW6 Ashok Kumar, Excise Inspector was first recorded on 29.11.1994"by the learned trial Judge and in that statement, he has stated that he deposited the seized articles on 16.3.1994 in the Sessions Court, Pratapgarh, after taking them from the Treasury, but these articles were not put before him when his statement was recorded and when he was re- examined on 22.12.1995, the seized articles were produced before him and thus, there is no link evidence in the present case how the seized articles from Sessions Court, Pratapgarh to Court of Addl. Sessions Judge, Nimbahera were sent and with whom they were sent, as that case was transferred from the Court of Sessions, Pratapgarh to the Court of Addl. Sessions Judge, Nimbahera and thus, the possibility that samples would have been tampered with cannot be ruled out.

In this respect, the learned counsel for the accused appellants has placed reliance on the decision of the Hon"ble Supreme Court in State of Rajasthan v. Daulat Ram (1).

2. That there is clear cut evidence in the statements of the prosecution witnesses that no separate seal was prepared by PW6 Ashok Kumar while prepared fard of search and seizure Ex. P/3 and thus, from this point of view also, the case of the prosecution becomes doubtful.

Hence, it is prayed that this appeal be allowed and both the accused appellants be acquitted of the charges framed against them.

5. On the other hand, the learned Public Prosecutor supported the impugned judgment and order dated passed by the learned Special Judge, NDPS Cases, Chittorgarh.

6. I have heard the learned counsel for the accused appellants and the learned Public Prosecutor and perused the record of the case.

Point No:1

7. In the present case, the fact that six packets of heroin were recovered on being search made by PW6 Ashok Kumar on 17.6.93, is well proved from the statement of PW6 Ashok Kumar and he was cross examined at length, but nothing has come out which affects his testimony. His statement is further corroborated on this point from the statements of PW4 Gopal Dixit and PW5 Dwarka Prasad, who were also with him. The fact that these articles were recovered from the Car in which both the accused appellants were sitting, is also well proved by the prosecution and these findings have not been much disputed by the learned counsel for the accused appellants.

8. Before dealing with the submissions made by the learned counsel for the

accused appellants, some dates pertaining to the seized articles how they were kept from one place to other are to be seen.

1. That on 17.6.1993, recovery of six packets of heroin was made by PW6 Ashok Kumar.
2. That on 17.6.1993, the samples were deposited in Malkhana and entries were made in Malkhana Register Ex.P/18.
3. That on 20.6.1993, samples Al, Bl, Cl, Dl, El and Fl were given to PW7 Mithalal and through letter Ex.P/21 dated 27.6.1993, he deposited the same in the State/ Central Public Health Laboratory, Rajas-than, Jaipur on 28.6.1993 as is evident from Ex.P/30.
4. That on 25.6.1993 through Ex.P/22, rest seized articles marked A, A2, B, B2, C, C2, D, D2, E, E2 and F, F2 were deposited by PW6 Ashok Kumar in the Treasury.
5. That on 14.12.1993, Sunderlal, PW1 was examined by the learned Sessions Judge, Pratapgarh.
6. That on 4.2.1994, PW6 Ashok Kumar was present, but his statement could not be recorded because seized articles were not before the Court.
7. That on 16.3.1994, rest articles were deposited from Treasury to the Sessions Court, Pratapgarh by PW6 Ashok Kumar.
8. That on 8.6.1994, the case was transferred to the Court of Addl. Sessions Judge, Nimbahera from the Court of Sessions, Pratapgarh.
9. That on 23.8.1994, Indermal, PW2 and Misrilal, PW3 were examined by the Addl. Sessions Judge, Nimbahera.
10. That on 26.9.1994, Gopal Dixit, PW4 was examined.
11. That on 29.11.1994, PW5 Dwarka Prasad Dixit, PW6 Ashok Kumar and PW7 Mithalal were examined.
12. That on 12.12.1994, evidence of the prosecution was closed.
13. That on 15.12.1994, statements of accused persons u/s 313 Cr.P.C. were recorded and the case was fixed for final argument on 2.1.1995.
14. That on 2.1.1995, arguments were heard and case was put for delivery of judgment on 9.1.1995.
15. That on 9.1.1995, the judgment was not pronounced and the case was again ordered to be listed for pronouncement of judgment on 14.2.1995.
16. That on 14.2.1995, the judgment was also not pronounced and the case was again ordered to be listed for further argument and pronouncement of judgment on 21.2.1995.

17. That on 21.2.1995, the judgment was also not pronounced on the ground that the Presiding Officer has been transferred.

18. That on 4.11.1995, an application u/s 311 Cr.P.C. filed on behalf of the APP for recalling PW6 Ashok Kumar was allowed and . PW6 Ashok Kumar was re-summoned.

19. That order sheet dated 18.11.1995 shows that seized articles were summoned from Treasury, Chittorgarh.

20. That order-sheet dated 4.12.1995 shows that articles have been deposited in the Court of Addl. Sessions Judge, Nimbahera.

21. That on 22.12.1995, statement of PW6 Ashok Kumar was again recorded.

22. That on 4.1.1996, statements of accused were recorded and case was ordered to be listed for arguments on 22.1.1996.

23. That from the order sheet dated 29.8.1996, it appears that this case was again transferred from the Court of ADJ, Nimbahera to the Court of Addl. Sessions Judge No.1, Chittorgarh, in pursuance of the order dated 2.8.1996 passed by this Court in S.B. Cr. Misc. Bail Petition No. 1792/96.

24. That on 17.10.1996, the judgment was pronounced.

9. It may be stated here that since there was confusion about depositing of the seized articles, this Court vide order dated 16.5.2001 directed the Registrar General (Vigilance) of this Court to submit the factual report. The Registrar General (Vigilance) submitted his report on 20.6.2001. This report shows that contraband articles were deposited in the Court of Sessions, Pratapgarh on 16.3.94, but after the transfer of that case from Pratapgarh to Nimbahera, they were not sent back to the Court of Nimbahera and they were deposited in the Court of Nimbahera on 28.11.1995. From the report, it further appears that after the transfer of the case from Addl. Sessions Judge, Nimbahera to Addl. Sessions Judge, Chittorgarh, the contraband articles remained with Court of ADJ, Nimbahera and they were never transferred to the Court of ADJ, Chittorgarh and the same are still lying in the Malkhana of Court of ADJ Nimbahera.

10. In the present case, there is no dispute on the point that the statement of PW6 Ashok Kumar was recorded on 29.11.1994 by the Court of ADJ, Nimbahera and on that day, seized articles were not with that Court and they were with the Court of Session, Pratapgarh and they were transferred to the Court of ADJ, Nimbahera before 4.12.1995, as articles seized were called from the Treasury, Pratapgarh by the Court on 18.11.1995 and order- sheet dated 4.12.1995 shd\ \vs that they were deposited in the Court before 4.12.1995, meaning thereby Court of ADJ, Nimbahera received articles on 28.11.1995 and when the statement of PW6 Ashok Kumar was recorded again on 22.12.1995, the seized articles were shown to him and PW6 Ashok Kumar has stated that these articles are the same, which were seized by him from the accused persons and he has

also identified his signatures and signatures of others.

11. The case of the learned counsel for the accused appellants is that there is no evidence in this case to prove the fact as to who took samples from the Court of Pratapgarh and, thereafter, deposited on 28.11.1995 in the Court of ADJ, Nimbahera and thus, link evidence is missing and person carrying seized articles from the Court of Session, Pratapgarh upto the Court of ADJ, Nimbahera has not been produced and from this point of view also, the case of the prosecution becomes doubtful.

12. In my considered opinion, the above argument carries no weight for the following reasons:-

13. So far as the case of the prosecution that six samples marked as AI, BI, CI; DI, EI and FI, which were sent to State/Central Public Health Laboratory, Rajasthan, Jaipur through Ex.P/21 dated 27.6.1993 and the same were deposited before the said Laboratory on 28.6.1993 is concerned, there is no dispute on this point and this fact is very well proved from the statements of PW6 Ashok Kumar and PW7 Mithalal. Thus, it is concluded that samples were deposited in a sealed condition and no question of tampering with them arises.

14. This is one of the aspects of the matter. But, there is" no evidence on the point that who took the sample from the Court of Session, Pratapgarh upto the Court of ADJ, Nimbahera, However, when they were produced before PW6 Ashok Kumar during recording his statement in Court on 22.12.1995, they were found to be in sealed condition.

15. It maybe stated here that for showing that sample was not tampered with after it was taken and till It reached the hands of the Chemical Examiner, it is necessary for the prosecution to produce evidence as to where the sample was kept after it was taken, by whom it was handled in the malkhana, by whom it was-taken to the Chemical Examiner. Persons handing the sample in malkhana and carrying the sample to the Chemical Examiner should be examined as witnesses in the Court. Any possibility of tampering with the sample has to be excluded. Failure to rule out possibility of its being tampered with may be fatal to the prosecution case.

16. So far as this aspect is concerned, as stated above, there is no possibility that the samples were in any manner tampered with after they were taken and till they reached the hands of the Chemical Examiner.

17. So far as the law laid down by the Hon"ble Supreme Court in Daulat Ram"s case (supra) is concerned, the same is also not helpful to the present accused appellants, as in that case, the sample of opium changed several hands before reaching the Public Analyst and yet none of those, in whose custody the sample remained, were examined by the prosecution to prove that while in their custody the seals on the samples were not tampered with, the inevitable effect of the omission was that the prosecution failed to rule-out the possibility of the sample

being changed or tampered with during the period in question, a fact which had to be proved affirmatively by the prosecution. Consequently prosecution could not be allowed to fill up the gaps in the prosecution story.

18. Since in the present case, there is clear cut evidence that when the samples were deposited by PW7 Mithalal in the State/Central Public Health Laboratory, Jaipur, their seals were intact. Thus, no question arises that seals of the samples were tampered with in any manner before they were deposited in the Laboratory for chemical examination.

19. So far as the missing of link evidence with regard to depositing of articles from the Court of Session, Pratapgarh to the Court of ADJ, Nimbahera is concerned, looking to the fact that there is link evidence from the date of seizure till samples were deposited in the Laboratory, Jaipur, this missing aspect would not affect the case of the prosecution, especially when PW6 Ashok Kumar has stated that when articles were produced before him, they were found to be in sealed condition.

20. The Hon'ble Supreme Court in a latest decision in Rangiram v. State of Haryana (2), has held that if there is evidence that sample sent to Chemical Examiner was in proper forum, the fact that seal was found broken in Court would not conclude that material was substituted.

21. In the present case, there is evidence, as already stated above, that seals on the articles and samples from the date of seizure till samples were deposited in the Laboratory for chemical examination were intact and apart from this, there is evidence that even in Court, the seals on the articles and samples were found intact and not in broken condition.

22. For the reasons stated above, the argument No. 1 fails and the same is hereby rejected.

Point No. 2

23. In order that Chemical examination of the sample taken from the seized contraband, has desired value, it is essential to show that the sample reached the Chemical Examiner intact and was not tampered with in transit etc. To ensure this, Chemical Examiner has to check whether seal on the container is intact or not. However, this much is not sufficient. The Chemical Examiner has further to ensure that seal on the container is the same by which the sample was sealed in the presence of the Panchas. For this purpose, it is necessary that specimen impression of the seal, which is used for sealing the sample, is also sent to the Chemical Examiner separately so that the Chemical Examiner may compare the seal on the sample with the specimen impression of the seal sent to his separately.

24. There is evidence in the present case that specimen seal has not been taken separately by PW6 Ashok Kumar and when it has not been taken, it was not sent to the State/Central Public Health Laboratory, Jaipur.

25."The next question is what would be the effect of this irregularity on the prosecution case.

26. This Court has taken the view in so many cases that it is a mere irregularity and it does not affect the prosecution case and on this ground alone, the findings of conviction recorded by the learned trial Judge cannot be set aside especially when evidence led by the prosecution on the point that seals on the seized articles and samples from the dale of seizure tilt samples were deposited in the Laboratory for chemical analysis remained intact and furthermore, they remained intact even when they were produced before PW6 Ashok Kumar on 22.12.1995.

27. Hence, the argument No. 2 also fails-and the same is rejected.

28. For the reasons stated above, the findings of the learned Special Judge, NDPS Cases, Chittorgarh by which he convicted both the accused appellants of the charge for the offence u/s 8/21 of the NDPS Act are liable to be confirmed, and this appeal is liable to be dismissed.

Accordingly, the appeal Tiled by the accused appellants Mukesh and Om Prakash is dismissed, after confirming the judgment and order dated 17.10.1996 passed by the learned Special Judge, NDPS Cases (Additional Sessions Judge No.1), Chittorgarh.