

(2011) 04 DEL CK 0101
In the Delhi High Court
Case No : Criminal Appeal No. 302 of 2008

Radhey Shyam

APPELLANT

Vs

The State (NCT of Delhi)

RESPONDENT

Date of Decision : 25-04-2011

Acts Referred:

Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 18, 29

Citation : (2011) 04 DEL CK 0101

Hon'ble Judges : Ajit Bharihoke, J

Bench : Single Bench

Advocate : Aditya Wadhwa, for the Appellant; Fizani Husain, APP, for the Respondent

Judgement

Ajit Bharihoke, J.—Radhey Shyam and Chottey Lal, the Appellants herein have preferred the instant appeals against the impugned judgment of Special Judge, NDPS, Delhi dated 21st January, 2008 and the consequent order on sentence dated 24th January, 2008 whereby the Appellants have been found guilty and convicted for the offences punishable u/s 18 of the NDPS Act and sentenced to undergo RI for the period of 10 years each with fine of Rs. 1 lakh each, in default of payment of fine, to undergo SI for one month each.

2. Briefly stated, case of the prosecution is that on 02nd June, 2004 at about 9.00 a.m., SI Sunil Kumar (PW8) of P.S. Narcotics Branch, Kamla Market received a secret information that four persons namely Radhey Shyam, Chottey Lal, Bagadi Ram and Bhairon Lal would bring Opium for supply in Delhi, Haryana and Punjab and that they would come to a place near Mori Gate between 10.30 to 11.30 a.m. This information was recorded as DD No. 8 dated 2.6.04 at police station Narcotics Branch. SI Sunil Kumar (PW8) organized a raiding party comprising of self and five others namely Head Constable Harcharan Singh (PW1), Head Constable Omkar Singh, Head Constable Kuldeep Singh (PW9), Constable Kheta Ram (PW3) and Constable Rajbir Singh. The police party left for Mori Gate with testing kit and an electronic weighing machine. "Nakabandi" was

held at Mori Gate Chaimbry. At about 11.00 a.m., above referred four persons were spotted coming from the side of Tis Hazari Courts. They were apprehended on the pointing of informer. Appellant Chottey Lal was carrying a white colored polythene bag containing a transparent polythene bag which was found to contain 7 Kgs. of Opium. Out of the recovered Opium, two samples of 25 gms. each was drawn. The samples sealed as well as remaining Opium were sealed in separate packets and taken into possession.

3. Appellant Radhey Shyam was also carrying a white colored bag having a transparent polythene bag containing 9 Kgs. of Opium. Two samples of 25 gms. each was drawn from the Opium recovered from Radhey Shyam. Samples as well as remaining Opium were sealed in the separate packets and seized vide a seizure memo.

4. It is the case of the prosecution that the Opium recovered from the accused persons and respective samples were sealed with the seal of 6A PS NB DELHI.

5. SI Sunil Kumar prepared "rukka" (Ex.PW8/B) and sent it along with the seized material as well as the form CFSL prepared at the spot to the police station through Constable Kheta Ram (PW3) for the registration of the case. On the basis of "rukka", formal FIR (Ex.PW5/A) was registered.

6. Form CFSL as well as the case property and the samples were produced before SHO P.S. Hooda, who also appended his seal "NBR DELHI" (Ex.PW8/C) on the case property and the samples and deposited it with MHCM. Nothing incriminating was recovered from the other two persons Bagadi Ram and Bhairon Lal. The samples were sent to FSL and on chemical analysis, the samples gave positive test for Opium. On completion of investigation, a consolidated charge sheet was filed against all the four accused persons.

7. The Appellants Radhey Shyam and Chottey Lal were charged u/s 18 of the NDPS act. They pleaded not guilty and claimed to be tried. They were also charged u/s 29 of NDPS Act along with Bagadi Ram and Bhairon Lal to which all the four accused persons pleaded not guilty and claimed trial.

8. It may be noted that there was some discrepancy regarding weight of samples received at FSL vis-?-vis the weight of the samples drawn at the spot of recovery. Thus a petition was filed requesting for drawing of fresh samples and sending for re-evaluation. Aforesaid petition was allowed by this Court vide order dated 16th July, 2007 and the prosecution was directed to redraw sample from the case property seized at the spot and send the same for chemical examination. The samples were accordingly drawn and sent to FSL for chemical analysis and those samples also tested positive for Opium.

9. In order to bring home the guilt of the Appellants, prosecution examined nine witnesses in all. Material witnesses, however, are the raid officer SI Sunil Kumar (PW8) and Head Constable Harcharan Singh (PW1) and Constable Kheta Ram (PW3), who were members of the raiding party. All of them in their testimony in

the court have supported the above referred version of the prosecution.

10. Other material evidence on record is the report dated 23.11.2007 of CFSL Ex.PX pertaining to analysis of the samples of the case property sent for analysis pursuant to the directions of this Court dated 16.07.2007 and the earlier CFSL report dated 14.09.2004 relating to the analysis of the samples drawn from the case property at the time of recovery.

11. Learned Additional Sessions Judge relying upon the testimony of the prosecution witnesses and other material on record, found the Appellants guilty of having illegal possession of 9 kgs and 7 kgs of opium respectively and convicted and sentenced both the Appellants for offence u/s 18 of NDPS Act.

12. Learned Shri Aditya Wadhwa, Advocate appearing for the Appellants has contended that the Appellants are innocent and their conviction is based upon incorrect appreciation of the facts. Expanding on the argument, learned Counsel submitted that the story of the recovery of opium from the possession of the Appellants is highly improbable for the reason that there is a mismatch between the FSL reports regarding the analysis of the samples allegedly drawn at the spot and the samples which were sent subsequently pursuant to the orders of the Court after drawing the same from the case property. In this regard, he has drawn my attention to the FSL report dated 14.09.2004 regarding analysis of the samples allegedly drawn from the case property in raid proceedings and the CFSL report Ex.PX pertaining to the analysis of samples subsequently drawn from the case property and pointed out that in the first report dated 14.09.2004 which was filed along with the charge sheet, the chemical analyst has opined that respective samples were found to contain 3.4% and 3.2% of opium, whereas as per the subsequent report Ex.PX, the samples drawn from the case property were found to contain 0.49% and 0.47% of Morphine. Learned Counsel has contended that this marked difference in the contents of Morphine of respective samples cast a strong doubt on the story of prosecution regarding the recovery of the Opium from the possession of the Appellants. Learned Counsel argued that had prosecution version been true, there would not have been such a difference in the Morphine content of the samples drawn from the case property at different occasions. Learned Counsel urged, this contradiction raise a strong possibility that the opium was not recovered from the possession of the Appellants and they have been falsely implicated in this case. Learned Counsel argued that aforesaid doubt against the prosecution story is compounded by the fact that the prosecution case is not supported by any independent witness, despite of the fact that admittedly there were shops near the place where secret information was received as well as the place of recovery. Admittedly, the raid officer did not make any effort to join a shop keeper to the recovery and instead he has come out with a vague explanation that he requested few passersby near the place of recovery as well as the place of occurrence to join the raiding party but no one obliged. Learned Counsel argued that had the Investigating Officer been serious about joining an independent witness, he was naturally expected to have given

preference to the shop keepers because their address was certain and they could be easily produced in evidence to support the case of prosecution. This, however, has not been done which cast a doubt against the correctness of prosecution case. Thirdly, it is argued that the doubt against prosecution case is further compounded by the fact that in all the arrest memos and personal search memos of the accused persons, there is manipulation regarding the date and in these memos the date of FIR as well as date of preparation of memos have been converted by overwriting to 2.06.2004. It may be noted that on perusal, it appears that 3.06.2004 has been converted by overwriting 2.6.2004. Learned Counsel has submitted that in view of the aforesaid contradictions coupled with the fact that there is also a discrepancy regarding inscription on the seal allegedly affixed by the raid officer and the SHO on the samples vis-?-vis the seal found on the samples at FSL by the concerned officer, it is not safe to rely upon the prosecution evidence which is based upon the testimony of the police officers who are interested in the success of the case. Thus, he has strongly urged for the acquittal of the Appellants.

13. Learned Ms. Fizani Husain, APP for the State, on the contrary has argued in support of the impugned judgment. Learned APP submitted that nothing turns on the discrepancy regarding the weight of samples drawn at the spot and found at the CFSL at the time of analysis. Learned APP pointed out that as per the CFSL report dated 14.09.2004 the samples were weighed along with polythene and submitted since the samples were weighed along with the polythene wrapping, it was bound to be more than 25 gms. As regards the discrepancy regarding the Morphine found in respective CFSL reports, learned APP pointed out that first report is dated 14.09.2004 and second report is dated 23.09.2007 and submitted that it is possible that due to time gap of three years, the content of Morphine in the case property came down because of some chemical reaction. Regarding description of the seal inscription, learned APP has contended that comparison of the testimony of the Raid Officer and the SHO P.S. Hooda (PW6) vis-?-vis CFSL report would show that the alphabets of the seal inscriptions found in the CFSL report dated 14.09.2004 are exactly similar to the alphabets of seal used by the Raid Officer and the SHO. The only discrepancy is that there is a difference of placement of alphabets in the seal inscriptions which can be attributed to typographical error. Learned APP submitted that Raid Officer as well as other witnesses of recovery have fully supported the case of the prosecution. There is no reason as to why the Raid Officer would falsely implicate the Appellants, who were residents of Madhya Pradesh, as such, there is no reason to doubt their testimony. Thus, learned APP has pressed for dismissal of the appeal.

14. I have considered the rival contentions and perused the record. Admittedly, the case of the prosecution is based upon the testimony of police officials. PW8 SI Sunil Kumar has admitted in his cross examination that secret information was received by him in his room at Narcotics Branch at Kamla Market, Delhi and there were shops in the vicinity but he did not call anybody from those shops to join the raid. He has also admitted that even near the place of recovery i.e.

roundabout Mori Gate, there were shops but he did not call anybody from those shops to join the raid. He however stated that near the place of secret information as well as the place of recovery, he requested passersby to join the raid but they declined to oblige. From this, it is evident that the Investigating Officer has not made sincere efforts to join the independent witness with permanent address to the raid. It is difficult to accept that a sincere and responsible Investigating Officer would prefer stray persons by over the nearby shopkeepers having permanent address, while investigating such a serious case. No doubt, the failure of the Investigating Officer to join independent witnesses, however, by itself cannot be taken as a circumstance to reject the testimony of the police officials. But, this calls for a cautious approach on the part of the Court while analyzing the evidence. Learned APP has tried to explain the non-joining of the public witnesses by the Investigating Officer by contending that secret information was received at 09.20 a.m. and police party reached at the place of recovery at 10.20 a.m. She contended it is possible that due to early hours of morning, the shops were not even open, therefore, the Investigating Officer had no occasion to request shopkeepers to join the raid. There is no merit in this contention for the reason that if the shops were closed, raid officer Sunil Kumar SI definitely would have clarified by deposing to this effect.

15. As per the testimony of raid officer SI Sunil Kumar, he had drawn two samples of 25 gms. each from the opium respectively recovered from the Appellants Chottey Lal and Radhey Shyam. Admittedly, the samples were sent to CFSL for analysis and as per the report of CFSL dated 14.09.2004 annexed to the charge sheet, respective samples were found to contain Morphine content to the extent of 3.4% and 3.2% respectively. Admittedly pursuant to the orders of this Court dated 16.07.2007 fresh samples were drawn from the case properties recovered from respective case and sent to CFSL. Those samples as per the report of CFSL Ex.PX gave an entirely different result i.e. the Morphine found in those samples was 0.49% and 0.47%. This huge variation in the content of Morphine in the sample sent earlier and the samples sent on subsequent occasions raise a strong doubt against the correctness of prosecution story, particularly when the prosecution has not been able to give a cogent explanation for this discrepancy. Only explanation given by learned APP is that the samples were sent for analysis after a gap of three years, therefore, a possibility cannot be ruled out that the Morphine content in the case property came down due to some chemical reaction. Learned APP has not been able to show me any scientific literature in support of her contention. Therefore, I find it difficult to accept the aforesaid explanation for mismatch between the two CFSL reports. This discrepancy in two CFSL reports definitely puts a question mark on the prosecution story. The doubt against the correctness of prosecution story is further compounded by the fact that there is no independent witness to the recovery of opium from the Appellants. Though the Investigating Officer has admitted that there were shops in the vicinity of aforesaid two places, he admittedly did not care to request any shopkeeper to join the raiding party and

was satisfied by requesting few passersby who perhaps did not have any time to wait for the accused persons to come and raid to materialize. This circumstance also cast a doubt on bona fides of the Investigating Officer. This Court is conscious of the fact that absence of public witness to recovery by itself cannot be a ground to reject the testimony of the police officials, yet in my considered view, this circumstance assumes importance in view of the fact that the two samples drawn from the case property on different occasions did not match when sent for chemical analysis. Not only this, there are cuttings regarding the date on the personal search memos as well as the arrest memos of the Appellants as well as the other accused persons arrested along with them. On perusal of memos Exhibits PW1/S, PW1/T, PW1/U, PW1/V, PW1/N, PW1/P, PW1/Q and PW1/R, it transpires that on all these memos there is overwriting regarding the date at the top and under the signatures of the IO. It appears that date has been converted to 2.6.2004 by overwriting from 3.6.2004. This also makes the prosecution version suspect and a possibility of manipulation cannot be ruled out.

16. In my aforesaid view, I draw strength from the judgment of Supreme Court in the case of *Rajesh Jagdamba Avasthi Vs. State of Goa*, where the Supreme Court taking note of the discrepancy regarding the weight of Charas allegedly seized from the accused vis-?-vis the weight of Charas found in the packet by the Junior Scientific Officer observed that aforesaid unexplained discrepancy eroded the credibility of recovery proceedings and rendered the case of prosecution doubtful. Relevant observations of the Supreme Court are reproduced thus:

12. However, there appears to be substance in the other submissions urged on behalf of the Appellant, namely, that the weight of the substance sealed in two envelopes was found to be different from the weight of the substance received by the laboratory as deposed to by PW-1. It is not disputed that from the shoe on the right foot 100 gms. of Charas was recovered, which was sealed in envelope "A". According to PW-1, the Junior Scientific Officer when that envelope was opened and the substance weighed it was found to be 98.16 gms. Similarly, from the shoe on the left foot 115 gms. of Charas was recovered which was packed and sealed in envelope B. But only 82.54 gms. of the substance was found in envelope B when the same was opened by PW-1. A similar submission was urged before the High Court and the High Court also found that this discrepancy could not be explained by the prosecution. The High Court observed that there was no doubt that the envelope B which was said to contain 115 gms. of Charas was found to contain only 82.54 gms. of Charas and this could not be considered to be a minor discrepancy. However, the High Court was of the view that even if this sample contained in envelope B was not considered against the Appellant on account of discrepancy in the weight, since there was no material discrepancy in the weight of the Charas found in the other envelope A, the case against the Appellant stood established on the basis of the Charas recovered, packed and sealed in envelope A.

13. It, therefore, concluded that the Appellant could be held guilty for

unauthorized possession of 98.16 gms. of Charas found in envelope "A", if not for the total quantity of 180,70 gms. as charged.

14. We do not find it possible to uphold this finding of the High Court. The Appellant was charged of having been found in possession of Charas weighing 180.70 gms. The Charas recovered from him was packed and sealed in two envelopes. When the said envelopes were opened in the laboratory by Junior Scientific Officer, PW-1, he found the quantity to be different. While in one envelope the difference was only minimal, in the other the difference in weight was significant. The High Court itself found that it could not be described as a mere minor discrepancy. Learned Counsel rightly submitted before us that the High Court was not justified in upholding the conviction of the Appellant on the basis of what was recovered only from envelope "A" ignoring the quantity of Charas found in envelope "B". This is because there was only one search and seizure, and whatever was recovered from the Appellant was packed in two envelopes. The credibility of the recovery proceeding is considerably eroded if it is found that the quantity actually found by PW-1 was less than the quantity sealed and sent to him. As he rightly emphasized, the question was not how much was seized, but whether there was an actual seizure, and whether what was seized was really sent for chemical analysis to PW-1. The prosecution has not been able to explain this discrepancy and, therefore, it renders the case of the prosecution doubtful.

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.

17. Learned APP has submitted that first CFSL report dated 14th September, 2004 cannot be looked into as it has not been relied upon by the prosecution nor it has been proved on record. This contention of learned APP is misconceived. The FSL report dated 14th September, 2004 has been relied upon in the charge sheet. Just because the prosecution has opted not to prove it on record, it cannot get away from the discrepancy in two CFSL reports.

18. In view of the discussions above, I am of the considered view that it is not safe to base conviction of the Appellants upon the testimony of the police officials who were interested in success of the case. Thus, the impugned judgment and the consequent order on sentence dated 24th January, 2008 cannot be sustained.

19. Appeals are accordingly accepted and the Appellants are acquitted of charge u/s 18, NDPS Act, giving them benefit of doubt. They be released forthwith, if not required in any other case.

20. Copy of this judgment be sent to concerned Jail Superintendent for information and necessary action.