
(1994) 01 RAJ CK 0003
In the Rajasthan High Court
Case No : Criminal Appeal No. 181 of 1993

Ram Kumar Singh

APPELLANT

Vs

The State of Rajasthan

RESPONDENT

Date of Decision : 05-01-1994

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313

Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 18, 54, 8

Citation : (1994) 1 RLW 11 : (1994) 1 WLC 480 : (1994) 1 WLN 25

Hon'ble Judges : R.S. Verma, J

Bench : Single Bench

Final Decision : Allowed

Judgement

R.S. Verma, J.—These two appeals pertain to the same incident and involve identical questions of fact and law, based on identical evidence. Hence, they have been heard together with consent of all concerned and are being disposed of by a common judgment.

2. In nut-shell the prosecution story is that on 6.8.1992 Shri Virendra Jakhar, S.H.O. P.S. Bhirani, Shri Tara Chand, S.H.O., P.S., Bhadra and Shri Atar Singh Shigh, S.H.O., P.S., Nohar were proceeding along with members of the staff on the road connecting village Daidas to Lal Khan's Dhani. They spotted two persons, namely, Ram Kumar Singh and Mahesh. The police officers suspected that the two persons were carrying opium with them. Hence, the aforesaid police officers accosted both these persons. Atar Singh informed these persons that if they so wanted, they could be searched in presence of a Magistrate or a Gazetted Officer. Both these persons, namely, Ram Kumar Singh and Mahesh consented to searches being made by Atar Singh. Upon this Atar Singh summoned two independent witnesses, namely, Sher Mohd. and Chanan Mal from a nearby place. Thereafter searches of the two persons were made by Atar Singh in presence of aforesaid police officers and Sher Mohd. and Chanan Mal.

3. It is alleged that upon search of Ram Kumar Singh, a small parcel was found

in the right pocket of his trouser and the same contained opium. A sum of Rs. 19,000/- was also recovered from pocket of Ram Kumar Singh. Ram Kumar Singh was arrested since he was found in possession of opium without any licence and an arrest memo was prepared in this regard. Out of the recovered contraband, a sample of 30 gms. of opium was taken separately and the sample was duly sealed and the remaining contraband was also sealed and proper memos were prepared in this regard.

4. Shri Atar Singh also searched Mahesh after obtaining his consent and he was found to carry in his right hand a bag which contained two small bags of plastic containing opium. A sum of Rs. 10,000/- was also recovered from possession of Mahesh Kumar. The opium so recovered was found to weigh 850/- gms., out of which a sample of 30 gms. was taken separately and the remaining opium was sealed and memos were prepared in this regard. Site inspection and site plan were also prepared.

5. The prosecution story is that Atar Singh proceeded to Police Station, Nohar with the arrested accused persons and recorded two distinct First Information Reports with regard to the recoveries, one made from Mahesh Kumar and the other made from Ram Kumar Singh. The FIR pertaining to recovery made from Mahesh Kumar is 177/92 and FIR with regard to Ram Kumar Singh was recorded as FIR No. 178/92.

6. It is alleged in both the cases that the sealed contraband and the sealed samples were kept in the custody of Police Station, Nohar and were sent to the State Forensic Science Laboratory, from where reports were received showing that both the samples contained opium. Upon such evidence separate trials were conducted in respect of Ram Kumar Singh as well as Mahesh Kumar. In respect of Ram Kumar Singh, trial was conducted in Sessions Case No. 55/92 and the same was decided on 8.4.1993. Accepting the prosecution case, the learned trial court found Ram Kumar Singh guilty of charge u/s 8/18 of the Narcotic Drugs and Psychotropic Substances Act and sentenced him to undergo R.I for 10 years and to pay a fine of Rs. 1,00,000/- and in default of payment of fine to undergo further R.I for one year. In respect of Mahesh Kumar trial was conducted in Sessions Case No. 56/92 and by judgment dated 9.4.1993, and learned trial Judge accepting the prosecution case, convicted mahesh Kumar for offence u/s 8/18 of the aforesaid Act and sentenced him to undergo R.I for ten years and to pay a fine of Rs. 1,00,000/- and in default of payment of fine to undergo further R.I. for one year.

7. Ram Kumar Singh has filed S.B. Criminal Appeal No. 181/1993 and Mahesh Kumar has filed S.B. Criminal Appeal No. 182/1993.

8. In both the appeals, the learned Counsel for the appellants submits that the investigation suffered from a very serious infirmity in as much as the officer effecting seizures and recoveries has himself conducted the investigation. This has caused serious prejudice to the appellants in both the cases inasmuch as

independent and fair investigation could not be made. It is contended that out of the independent alleged eye- witnesses, only one witness, namely, Slier Mohd. was examined. The other alleged independent witness Chanan Mal was not examined at all. Sher Mohd. has not supported the prosecution story at all and hence the accused appellants in both the cases deserve to be acquitted.

9. The learned P.P. opposes both the appeals and submits that the law nowhere mandates that a person effecting seizures and recoveries cannot investigate into the offence. She submits that the appellants in both the cases had a fair trial and they had opportunity of showing that the investigation suffered from any remissness on the part of the Investigating Officer. She submits that the testimony of Atar Singh in this case, though not supported by Slier Mohd. has been supported by Shri Virendra Jakhar and Tara Chand, both of whom are senior police officers.

10. In reply, the learned Counsel for the appellants submits that Virendra Jakhar and Tara Chand were as much interested in the success of the case as Shri Atar Singh. They are not independent persons and their testimony does not inspire confidence. The consent of appellants for search by Atar Singh was obtained under the circumstances in which the consent cannot be said to be voluntary and, therefore, alleged seizure and recoveries are invalid and improper in the eye of law and violate provisions of Section 54 of the aforesaid Act and on this score both the appellants deserve to be acquitted.

11. I have heard the learned Counsel for the parties and have considered the rival contentions and have perused the record of the learned trial court in respect of both the appellants.

12. The investigating officer in this case is the officer, who had effected recoveries. Virendra Jakhar and Tara Chand are his colleagues, though belonging to different police stations. But the fact that it was a joint raid by all these police offices, naturally they are interested in the success of the investigation and it would be idle to expect that they would not support each other.

13. The only independent witness in the cases Slier Mohd. has not supported the prosecution case at all. He was examined as PW 1 in both the cases and was declared hostile but nothing has come in his evidence which may support the prosecution story.

14. Chanan Mal has not been examined in any of the cases. He was an independent witness and the learned public prosecutor conducting the two trials was under an obligation to examine him. Non-examination of Chanan Mal raises an inference that in case he would have been examined, he would not have supported the prosecution case.

15. The alleged consent taken from two accused appellant in presence of three police officers belonging to the same rank does not inspire confidence, particularly when the investigating officer and the officer making the recoveries is

the same. The matter is no longer *res integra*. In this connections I may refer first of all to *Bhagwan Singh v. The State of Rajasthan* 1975 SCC 737. In that case, the apex Court had an occasion to deal with the case in which investigation officer was the self-same person who was the first informant in the case. Their Lordships of the apex Court observed:

It is indeed such an unusual feature that it is quite surprising that it should have escaped the notice of the trial court and the High Court. Head Constable Ram Singh was the person to whom the offer of bribe was alleged to have been made by the appellant and he was the informant or complainant who lodged the first Information report for taking action against the appellant. It is difficult to understand how in these circumstances Head Constable Ram Singh could undertake investigation of the fact. Head Constable Ram Singh being an officer below the rank of Deputy Superintendent of Police, was not authorised to investigate the case but we do not attach any importance to that fact as that may not affect the validity of the conviction. The infirmity which we are pointing out is not an infirmity arising from investigation by an officer not authorised to do so, but an infirmity arising from investigation by a Head Constable who was himself the person to whom the bribe was alleged to have been offered and who lodged the first information report as informant or complainant. This is an infirmity which is bound to reflect on the credibility of the prosecution case.

16. In *Roland Murkas Goonthar v. State of Rajasthan* 1988 Cri. LR 678, a learned single Judge of this Court had an occasion to deal with a similar circumstance. In that case, the S.H.O. seized the contraband drugs and sent FIR to Police Station and the investigation was conducted by himself. This was a fact which was considered to create suspicion in the fairness of the investigation. The learned single Judge has observed:

The investigating agency should normally be different from the person who appears as a witness. Hanuman Singh has stated that he seized the articles, he lodged the first information report and he deposited the same at the police station, There is no prohibition under the law which debars Hanuman Singh from investigating the case further. However, it is expected that in such a case there should be investigation by any other agency, may be of superior rank.

The aforesaid infirmity was held to discredit the prosecution case and the appeal was accepted and the accused appellant was acquitted.

17. Another learned single Judge of this Court in *S.B. Criminal Appeal No. 380/1988 Rana Ram v. State of Rajasthan* decided on August II, 1989, relying upon *Bhagwan Singh's* case (*supra*) and *Ronald Markas (Goonthar's* case (*supra*), was of the view that S.H.O. Padamsingh, who had recovered the opium in this case and lodged the report, should not have investigated the matter and that was an infirmity in the prosecution case.

18. In *Banshi Lal v. State of Rajasthan* RLW 1990(1) 417, Hon''ble S.M. Jain, as he then was, had an occasion to consider this very aspect. The learned Judge

dealing with this aspect has observed:

The principal contention advanced by the counsel for the appellant is that he has been denied a just and fair trial inasmuch as it was Head Constable, Ganpat Singh who made the search of the appellant and recovered 200 grams of opium from his pocket. It was Ganpat Singh who arrested the accused, registered the case and investigated the same. Thus, Ganpat Singh acted both as a complainant and an investigator. This was impermissible and has resulted in gross-miscarriage of justice to the accused...In any event, argues learned Counsel for the appellant, the role of head constable Ganpat Singh both as a complainant and investigator-goes to the root of the matter and vitiates the entire trial.

The learned Judge accepted the contention and held that the prosecution has failed to prove fairly and beyond a reasonable doubt its case, against the accused, The appeal was accepted and conviction and sentence of the appellant for the offences u/s 8/18 of the N.D.P.S. Act was set aside.

18. I had also an occasion to deal with a similar circumstance in *Nathiya and Another Vs. State of Rajasthan*, Dealing with this contention I had observed:

Justice and fair play require that the Investigation should have been carried out by an Independent officer, who was not in any way a party to the recovery proceedings.

I further observed:

I am, therefore, of the view that in this case, the Investigation suffers from the basic Infirmary, in as much as the officer recovering the contraband charas was the self-same person who had Investigated Into the case; the Investigation was basically bad and reflects upon the credibility of the Investigation, The Director General of Police would do well to Issue proper instructions to all Investigating Officers in the State to ensure that this basic principle is not flouted while conducting Investigation.

I am not aware if the Director General of Police has issued any instruction in this regard or not. I would re-emphasise that the Director General of Police should issue necessary instructions so that an independent officer is made available to make investigation in a case where seizure and recoveries have been made by a police officer, This would obviate the charge that the investigating officer was not independent in his approach,

19. This Court had another occasion to deal with this aspect of the matter in *Deepa Ram v. State of Rajasthan* 1991 Cri. LR 771. The learned Judge of his Court relying upon *Bhagwan Singh's* case (supra) and *Banshi Lal's* case (supra) held that the order of conviction could not be sustained and the same was liable to be quashed,

20. Thus there are catena of rulings of this Court based on the observations of the apex Court that an officer making recovery should not investigate into the

matter but investigation should be made by an independent officer and preferably by a superior officer.

21. Now, I may deal with the ruling cited by the learned P.P., namely Bennehard J. Framous @ Ortege Francis Vs. State, In this ease similar contention was raised before the learned Judge of the Delhi High Court as has been raised before me. The learned Judge disagreeing with the proposition laid down in Nathiya's case (supra) observed that:

It is not possible to lay down any such broad proposition of law that in no ease Investigation should be done by the officer who effects the recovery

He further observed:

It is to be emphasized that in a case like the present where recovery effected from the appellant is the only material evidence which needs to be collected, there arises no question of entrusting the investigation to any other officer in such circumstances. After all the investigation is over the moment the recovery is effected and the statements of the witnesses are recorded who are present at the spot.

This ruling did not take into consideration the dictum of the Supreme Court in Bhagwan Singh's case (supra). Moreover, the learned Judge was under an impression that the investigation came to an end with the recoveries having been made and the statements having been recorded. The veracity and correctness of the recoveries still require to be evaluated and if this is done by independent and preferably by a superior officer an objective result may be made available on the basis of which an accused can be tried. In the present case three police officers nabbed two persons and claimed to obtain consent from both of them that they were agreeable to be searched being made by one of them and eventually searched them. This is said to have been done in presence of two independent witnesses, one of whom was not produced at the trial at all and the other did not support the prosecution story. This raises a serious doubt about the veracity of the recoveries and seizures themselves and make the prosecution case doubtful. it is surprising in both the cases that accused would agree to searches being made by Atar Singh even though they had a right to insist searches either in presence of a Magistrate or by Senior Gazetted Officer. It may be stated that appellant Ram Kumar Singh is altogether an illiterate witness while Mahesh Kumar appears to be semi literate. Both of them in their statements recorded u/s 313, Cr. PC. have denied the prosecution story altogether. According to Mahesh Kumar a sum of Rs. 10,000/- was of course recovered from his possession but he did not carry any opium in his bag. According to him he was brought from village Sheodanpura by the police. To a similar effect is the statement of Ram kumar Singh.

22. Admittedly, according to the prosecution it was on the road leading to village Daidas to Lal Khan's Dhani that the two appellants had been nabbed but in none of the cases independent witnesses belonged to either village Daidas or to Lal

Khan's Dhani. Witness Chanan Mal belongs to village Bhagwan, while witness Slier Mohd. belongs to Araiyanwali's Dhani. It is surprising why the police officers did not associate independent witnesses either from village Daidar or from Lal Khan's Dhani. This also renders the prosecution story open to doubt and creates a good deal of suspicion regarding veracity of the prosecution case.

23. It is true that Virendra Jakhar, Tara Chand and Atar Chand in a parrot like fashion have stated that two appellants were accosted, nabbed and opium was recovered from their possession. These witnesses could not be expected to own the defence set up by the accused appellants. According to Virendra Jakhar he had received a Radiogram that day i.e. 6.8.1992 that he had to assist the S.H.O. Bhadra in connection with a raid for recovery of opium. It is stated that the Radiogram had been received from P.S. Bhadra. No such radiogram has been placed on record. Tara Chand is S.H.O. of P.S. Bhadra and he does not state that he had sent any such radiogram to Virendra Jakhar. Atar Singh claims that on the night prior to 6.8.1992 he had received an order for Circle Officer, Nohar to join S.H.O., Bhadra in the raid. No such order of Circle Officer, Nohar has also not been produced in support of these contentions. Omission to produce the radiogram or to examine Circle Officer, Nohar also creates a doubt about the veracity of the case set up by these three witnesses. Had a senior police officer been associated, he could have checked up all these facts and would have found out the truth of the matter. The Delhi High Court ruling cited before me, failed to take notice of all these salient features which may be available in cases in which the officer making the recovery is himself the investigating officer. The learned public prosecutor was unable to explain as to why the Circle Officer, Nohar was not examined in the case or why the alleged radiogram was not placed on record. If such material would have been placed on record, it would have lent credence in credibility to the prosecution story.

24. I may here state that I do not mean to say that the testimony of police officers should be discarded only on the ground that they are police officers. The testimony of police officers has to be evaluated in the same manner as that of another independent witness. This is not a case where conviction of the two appellants should be upheld on the basis of the testimony of the three police officers referred to above, unsupported by independent evidence. More so when there are infirmities in the investigations pointed out above.

25. I have already alluded to the defence taken by the two appellants. Had a senior and independent Investigating Officer been associated with the investigation, he could have ascertained the truthfulness or otherwise of the defence that the two accused appellants were arrested at Sheodanpura and they had gone to Sheodanpura to purchase wheat. Non-association of an independent investigating officer has handicapped the two appellants and has thus caused serious prejudice to them.

26. This is true that the Police Officers under reference have denied that they apprehended two appellants from Sheodanpura but PW 5 Tara Chand in Sessions

Case No. 55/92 has admitted that eS mDr izdj.k dh dk;Zokgh ds ckn ";sknkuiqj
ls jokuk gksdj igys Fkkuk uksgj igqapk mlds ckn Fkkuk Hkknjk x;k Fkka

PW 4 Virendra Jakhar also admits in his cross-examination in Sessions Case No. 56/92 that he had gone to village Sheodanpura. PW 5 Tara Chand in Sessions Case No. 56/92 has made a similar admission. A possibility that the two accused appellants might have been arrested at Sheodanpura thus cannot be ruled out. The learned trial Judge has, not cared to scrutinize this defence at all. The learned trial Judge was under an obligation to scrutinize the defence raised by the two accused appellants and see if the defence was probablized from the circumstances of the case. The answers given by the accused are required to be taken into consideration by the learned trial Judge and in the present case, the learned trial Judge has failed to discharge this duty properly.

27. In view of what I have stated above, I find it difficult to uphold the conviction of the two appellants Mahesh Kumar and Ram Kumar Singh and sentence passed against them for offences u/s 8/18 of the Narcotic Drugs and Psychotropic Substances Act.

28. I, therefore, allow both these appeals and set aside the judgments of the learned trial Judge convicting and sentencing the two appellants and acquit them of charges u/s 8/18 of the Narcotic Drugs and Psychotropic Substances Act. Both the appellants are in jail and they shall be released forthwith if not required in any other case. Fines if deposited shall be refunded to them.