
(2001) 08 RAJ CK 0067
In the Rajasthan High Court
Case No : Criminal Appeal No. 46 of 1999

Shanker Lal and Others

APPELLANT

Vs

State of Rajasthan

RESPONDENT

Date of Decision : 24-08-2001

Acts Referred:

Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 18, 42(1), 50, 8

Citation : (2003) 2 RCR(Criminal) 350 : (2003) 1 RLW 347 : (2002) 4 WLN 338

Hon'ble Judges : Sunil Kumar Garg, J

Bench : Single Bench

Advocate : Sandeep Mehta, for the Appellant; M.A. Bhurat, 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 16.1.1999 passed by the learned Special Judge, NDPS Cases, Chittorgarh in Session Case No. 214/97 (102/96) by which he convicted the accused appellant for the offence u/s 8/18 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as "the NDPS Act") and sentenced them to undergo ten years rigorous imprisonment and to pay fine of Rs. one lac, in default of payment of fine, to further undergo R1 for two years.

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

On 24.6.1996 at about 11.00 PM, PW 14 Prithvi Singh, SHO, Police Station Chanderiya District Chittorgarh made Parchakayami (Ex.P/24) stating inter-alia that he received a secret information at about 8.00 PM from mukhbir to the effect that accused appellant No. 2 Parthu, resident of Paroli and accused appellant No. 1 Shanker, also resident of Paroli had gone to Mishro-ki-pipli for purchasing opium and after purchasing it, they were coming on cycle alongwith the opium and in case the search was not conducted within time, there was every possibility that they would conceal the opium and the purpose of information would be

frustrated. Since PW 14 Prithvi Singh found that information reliable, therefore, he reduced it into writing under the provisions of Section 42(1) of the NDPS Act and the copy of it Ex.P/22 was sent by him to SP as well as to Dy. SP, Chittorgarh through PW 7 Subhash Chandra, PW 14 Prithvi Singh also got registered that information in the Rojnamcha Ex.P/27. Thereafter, PW 14 Prithvi Singh along with raiding party consisting of PW 1 Himmat Singh, PW 10 Kamal Singh, PW 13 Janak Singh, PW 12 Dadu Singh, PW 6 Manilal and others proceeded at about 8.15 PM towards the spot in a Government Jeep and reached the place known as "Mataji Ki Pandoli" at about 8.30 PM and made Nakabandi and they also took two motbirs, namely, Narendra Kumar (PW 5) and Shambhu Singh (PW 2). Thereafter, they saw two persons coming on cycle and they were recognized by PW 1 Himmat Singh as accused appellant and after calling them, they were asked to stop, but the person named as Shankar ran away from the scene after leaving his cycle, but another accused person was caught red-handed on the spot and on being asked, he told his name as Parthu (present accused appellant No. 2) and there was a bag lying on the handle of his cycle and he was informed about the secret information of the mukhbir that he had contraband opium and he was given a notice Ex.P/4 u/s 50 of the NDPS Act by PW 14 Prithvi Singh asking him whether he wanted to be searched before the Magistrate or Gazetted Officer and upon this, he gave his consent that search could be made by PW 14 Prithvi Singh and, thereafter, accused appellant No. 2 Parthu was searched and on search, a bag was recovered and it was opened and polythene bag containing black-brown colour liquid substance was found in it and on being tasted, it was assessed that it was opium and on being asked, accused appellant No. 2 Parthu told that he has no valid license to keep that opium. Thereafter, it was weighed and its weight was found to be 1 kg., out of which, two samples of 30 gms. each were taken and sealed separately on the spot and marked as A/1 and A/2 and rest opium was also sealed on the spot separately and marked as A.

Thereafter, the bag, which was lying on the cycle of accused appellant No. 1 Shankar, who ran away after leaving it, was opened and in it, polythene bag containing black-brown colour liquid substance was found and on being tasted it was assessed that it was opium. It was weighed and its weight was found to be 500 grms., out of which two samples of 30 grms. each were taken and sealed separately on the spot and marked as B/1 and B/2 and rest opium was also sealed on the spot separately and marked as B.

PW 14 Prithvi Singh prepared the fard of search and seizure on the spot and the same is Ex.P/3. The fard of specimen impression of seal is Ex.P/5. The cycles of both accused appellants Shankar and Parthu were seized through fards Ex.P/6 and Ex.P/7 respectively. The accused appellant No. 2 Parthu was arrested on the spot through arrest memo Ex.P/2, while accused appellant No. 1 Shankar was arrested on 17.10.1996 through arrest memo Ex.P/17. A detailed report to make compliance of Section 57 of the N.D.P.S. Act was sent by PW 14 Prithvi Singh to the higher officers and the same is Ex.P/23. PW. 14 Prithvi Singh chalked out regular FIR Ex.P/25. The seized articles and samples were handed over by PW 14

Prithvi Singh to Malkhana Incharge PW 9 Chain Singh, who deposited the same in the malkhana and made entries in the Malkhana Register Ex.P/20. Thereafter, vide letter Ex.P/11, two samples were sent to S.P. Office, Chittorgarh through PW 7 Subhash Chandra for sending them to F.S.L. for chemical analysis. Thereafter, PW 15 Jamnalal, who was working at the relevant time in the SP Office, Chittorgarh, gave a fresh forwarding letter Ex.P/12 addressed to F.S.L., Jaipur alongwith two samples to PW 7 addressed to FSL, Jaipur alongwith two samples to PW 7 Subhash Chandra, who deposited the same in the F.S.L., Jaipur and obtained receipt Ex.P/13. The F.S.L. report is Ex.P/29, where it was reported that the sample contained in the packet marked A/1 and B/1 gave positive tests for the presence of Chief constituents of coagulated juice of opium poppy having 5.60% (Six point one eight percent) Morphine respectively.

After usual investigation, police filed challan in the Court against the accused appellants.

On 28.2.1997, the learned Special Judge, NDPS Cases, Chittorgarh framed charges for the offence u/s 8/18 of the NDPS Act against the present accused appellants, but on 26.11.1998, amended charge was framed against accused appellant No. 1 Shanker. The charges were read over and explained to the accused appellants. They denied the charges and claimed trial.

During trial, the prosecution in support of its case examined as many as 16 witnesses and got exhibited some documents. Thereafter, statements of the accused appellants u/s 313 Cr.P.C. were recorded. In defence, no evidence was produced by the accused appellants.

After conclusion of trial, the learned Special Judge, NDPS Cases, Chittorgarh through his judgment and order dated 16.1.1999 convicted and sentenced the accused appellants in the manner as indicated above holding inter-alia that the prosecution has proved its case beyond all reasonable doubts against the accused appellants for the offence u/s 8/18 of the NDPS Act.

Aggrieved from the said judgment and order dated 16.1.1999 passed by the learned Special Judge, NDPS Cases, Chittorgarh, this appeal has been filed by the accused appellants.

3. In this appeal, the learned counsel appearing for the accused appellants has made the following submissions:-

1. That after receiving the secret information from mukhbir, PW 14 Prithvi Singh has not recorded the grounds of his belief that it was not possible for him to obtain a search warrant or authorisation, as the search and thus, compliance of mandatory provision of Section 42(1) of the NDPS Act has not been made in this case and thus, the whole trial stands vitiated and the accused appellants are entitled to acquittal.

2. That prosecution has also not produced reliable link evidence to show that the articles and samples were kept in proper custody and proper form and the

samples were not tampered with after they were taken and till they reached the hands of the Chemical Examiner and for that, one of the grounds taken by the learned counsel for the accused appellants is that specimen impression of the seal was not forwarded to the FSL alongwith the samples and furthermore, the samples of 30 grms. each were taken on the spot, but the FSL report shows that weight of the samples was 24 grms. and 23 grms. along-with the polythene packet and in these circumstances, conclusion can be drawn that the samples were tampered with and the benefit of doubt be given to the accused appellants.

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

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

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

6. Before proceeding further, it may be stated here that so far as they recovery of opium from the accused appellant No. 2 Parthu and from the bag of accused appellant No. 1 Shankar is concerned, the same is well proved from the statements of PW 14 Prithvi Singh, PW 1 Himmat Singh, PW 10 Kamal Singh, PW 13 Janak Singh, PW 12 Dadu Singh and PW 6 Manilal.

Point No. 1

7. This point relates to Section 42(1) of the NDPS Act and to see whether compliance of Section 42(1) of the NDPS Act has been made in this case or not, the evidence and the documents produced by the prosecution have to be looked into.

8. Before proceeding further, it may be stated here that the provisions of Section 42 of Section 42 of the NDPS Act are mandatory in nature. For that the decision of the Hon"ble Supreme Court in State of Punjab v. Balbir Singh (1), Mohinder Kumar v. The State, Panaji, Goa (2), State of Punjab v. Baldev Singh (3) and Abdul Rashid Ibrahim Mansuri v. State of Gujarat (4) may be seen.

9. PW 14 Prithvi Singh has categorically stated in his statement that as soon as he received the secret information from mukhbir, he reduced it into writing and, thereafter, he sent copy of it to SP and Dy.SP, Chittorgarh and Ex.P/22 is the carbon copy of that information, which he reduced into writing and apart from that, he also entered that information in Rojnamcha Ex.P/27. In croexamination, this witness has admitted that the original copy of Ex.P/22 was sent to Dy.SP and thee is no dispute that Ex.P/22 is the carbon copy of the information, which was reduced into writing by PW 14 Prithvi Singh.

10. Thus, so far as the recording of information into writing and sending of its copy by superior officers is concerned, the same is well proved from the

statement of PW 14 Prithvi Singh.

11. In the Rojnamcha Ex.P/27 as well as in fard Ex.P/22, there is mention of the fact that if delay is caused in proceeding towards the spot, the purpose would be frustrated. It has been further recorded in them that in case other formalities are performed, the same would have afforded an opportunity to the accused to conceal the evidence or would have facilitated their escape.

12. Proviso to Sub-section (1) of Section 42 of the NDPS Act provides that if the empowered officer has reason to believe that a search warrant or authorisation cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place at any time between sunset and sunrise after recording the grounds of his belief.

13. In my considered opinion, looking to the words as recorded in Rojnamcha Ex.P/27 as well as in the carbon copy Ex.P/22, grounds of belief as required are found and that is why, PW 14 Prithvi Singh proceeded alongwith the raiding party towards the spot just after recording the secret information and sending copy of it to the higher officers.

14. Thus, it can be concluded that compliance of Section 42(1) & (2) of the NDPS Act has been made by PW 14 Prithvi Singh and the argument No. 1 is rejected.

15. So far as the decision relied upon by the learned counsel for the accused appellants in Paramjit Singh @ Angrej Singh v. Union of India (5), is concerned, in that case, this Court came to the conclusion that prosecution has led no evidence before the trial court in the form of either case diary or any other document admissible in evidence which would have duly indicated the date and time before they left for the place of occurrence or the prior permission or authorisation which the said officer had obtained from the appropriate authority, as is mandatorily required under the provisions of Section 42 of the NDPS Act. The fact of that stands distinguished from the facts of the present case and, therefore, in no manner, this authority would be helpful to the accused appellants.

Point No. 2

16. From the statement of PW 14 Prithvi Singh, it is well proved that he handed over the seized articles and samples to PW 9 Chain Singh, who was at the relevant time Malkhana Incharge.

17. PW 9 Chain Singh states in his statement that all the seized articles and samples were given to him by PW 14 Prithvi Singh and he deposited the same in malkhana and made entries in the malkhana Register Ex. P/20 and he has proved the said entries. He has further stated that on 16.10.1996, he gave two samples marked A/1 and B/1 to PW 7 Subhash Chandra and on 18.10.1996 PW 7 Subhash Chandra gave him receipt of depositing samples in FSL, Jaipur.

18. In cross examination, this witness admits that before entering the seized

articles in the malkhana Register, he further seized articles in the malkhana Register, he further sealed them and from this, it has been submitted by the learned counsel for the accused appellant that it should be taken for granted that seal was tampered with. In my considered opinion, this submission is not correct, as PW 9 Chain Singh, Malkhana Incharge has clearly stated that articles, which were given to him in sealed condition, were re-sealed by him and he nowhere admitted that seal of the articles was broken in any manner. Therefore, if he has re-sealed the articles, it would not lead to the conclusion that seal has been tampered with.

19. So far as non-sending of specimen impression of seal alongwith samples to FSL is concerned, in my considered opinion, this lacuna in nothing, but mere procedural irregularity, which does not vitiate the entire trial, if there is evidence that in sealed condition the samples were deposited in FSL, in other words, seal of samples from the date of seizure till they reached the hands of the Chemical Examiner remained intact.

20. In this case, from the statement of PW 9 Chain Singh, it is well proved that. he handed over the samples to PW 7 Subhash Chandra, who through letter Ex.P/11 first carried these samples to SP Office, Chittorgarh and after obtained a forwarding letter Ex.P/12 From PW 15 Jamnalal, who was working in the SP Office, he deposited the samples in the FSL and obtained receipt Ex.P/13. Thus, there is link evidence and the prosecution has proved that the seized articles and samples have been kept in proper custody and proper form. From the evidence on record, it can reasonably be inferred or presumed that the samples were not tampered with after they were taken and till they reached the hands of the Chemical Examiner.

21. So far as the argument with regard to difference in weight of samples is concerned, it may be stated here on the spot, samples of 30 grms. each were taken and the FSL report ex.P/29 shows mat weight of the samples was 24 grms. and 23 grms. and that difference in weight is small and negligible, which could be due to some minor defect in weight measures. Apart from this, if there would have been any . evidence which might have resulted in making conclusion that samples in any manner before depositing in FSL were tampered with, this argument would have been helpful to the accused appellant. Singh in the present case, there is positive evidence that the seals on the samples from, the date of seizure till they reached the hands of the Chemical Examiner remained intact, therefore, by this small and negligible difference in weight, it cannot be inferred or concluded that the samples have been tampered with. Hence, this argument would not be helpful to the accused appellants. .

22. For the reasons stated above, the findings of the learned Special Judge convicting the accused appellants for the offence u/s 8/18 of the NDPS Act are liable to be confirmed, as they are based on correct appreciation of evidence and this appeal filed by the accused appellants is liable to be dismissed.

Accordingly, the appeal filed by the accused appellants Shankar and Parthu is dismissed, after confirming the judgment & order dt. 16.1.99 passed by the learned Special Judge, NDPS Cases, Chittorgarh.