

(2016) 10 RAJ CK 0044

In the Rajasthan High Court

Case No : Criminal Appeal (Crla) No. 218 of 1990.

**State of Rajasthan - Appellant @HASH Dharma Ram S/o Choona Ram, b/
c Bishnoi**

Date of Decision : 05-10-2016

Acts Referred:

Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 17, Section 18

Citation : (2016) 168 AIC 824 : (2016) 4 CriLR 1902

Hon'ble Judges : Ms. Nirmaljit Kaur, J.

Bench : Single Bench

Advocate : Mr. K.K. Rawal, Public Prosecutor, for the State; Mr. Doonger Singh, Advocate, for the Accused-Respondents

Final Decision : Dismissed

Judgement

Ms. Nirmaljit Kaur, J. - This criminal appeal has been preferred against the Judgment 9.1.1990 passed by the Sessions Judge, Jalore in Sessions Case No. 38/1987 whereby he has acquitted the accused of all the charges levelled against them.

2. As per the prosecution story, the accused-respondents were caught red-handed by the SHO concerned while travelling in a bus. At that time, the accused-respondents were found in possession of opium. They were actually arrested by the SHO concerned and a case against the accused respondents was registered for the offences punishable under Section 17 and 18 of the NDPS Act and challan was filed before the learned Munsif & Judl. Magistrate, Jalore who committed the case to the Court of the learned District & Sessions Judge, Jalore where the trial was conducted. The prosecution produced as many as six witnesses to prove its case.

3. The respondents were acquitted on the ground that the forwarding letter of the Superintendent of Police is dated 3.6.1987 whereas PW-6 Shrawan Kumar stated that he received the sample on 4.6.1987 and deposited the same on 5.6.1987. There was no explanation as to where the said contraband was kept on

3.6.1987; Secondly, the ground that Section 50 and 57 of the NDPS Act had not been complied with; thirdly, PW-6 Shrawan Kumar, had given the statement that the FSL was with respect to case No.71/1987 whereas the case in hand is 75/1987 and lastly on the ground that the forwarding letter by the Superintendent of Police was in the name of Govind Singh, Constable No.531 whereas PW-6 Shrawan Kumar has stated that he took the said sample for the FSL.

4. Being aggrieved and dissatisfied by the aforesaid judgment, the present appeal has been filed by the State on the ground that the Court fell in error in acquitting the respondents as Section 50 is not required to be complied with in the facts of the present case as the recovery was not from the "person" but from a bag. Further, the discrepancy is not fatal to the case as it was only a typographical error. The FSL report is with respect to the case No.75/1987 and the case too is 75/1987. The statement of Shrawan Kumar - PW6 stating that he had taken the sample relating to case No.71/87 is only a typographical error. Further, the seal was intact. Hence the statement of Shrawan Kumar that he received the sample on 4.6.1987 instead of 3.6.1987 and deposited on 5.6.1987 is not fatal to the case.

5. Learned counsel for the parties were heard at length and the record was perused.

6. Exhibit P/10 is the FIR. As per the said FIR, the bus was stopped for a regular check by the SHO Chuna Ram who is the Investigating Officer along with 5-6 other police constables. It is specifically mentioned in the FIR that a brown Rexine bag was lying next to the accused Dharma Ram and under the clothes in the said bag, a plastic packet was lying which contained 1.780 gms. opium. Similarly, one brown and black striped bag was also lying next to the accused Chokha Ram in which 2 kg. 230 gms. of opium was recovered. Accused Sukha Ram was sitting three seats behind them. He had a diamond briefcase and next to him, accused Sumer Singh was sitting. He opened the said briefcase with the key which was in the possession of Sukha Ram. On opening, they found two separate plastic bags and they recovered 2 kg. 100 gms. of opium. One VIP bag was also lying closed to accused Sumer Singh from which 900 gms. of opium was recovered which was kept in a plastic packet. Thereafter, statement of Chuna Ram, Investigating Officer was recorded as PW- 4. In his cross-examination, he has given two different versions at the same time. It would be relevant to reproduce the relevant part of the said statement:-

"cl esa vanj nksuksa rjQ NksVk lk eky j[kus dh tkyh yxh gqbZ FkhA lq[kjke cSBk Fkk mlds mij tkfy;ksa esa vVSph oxSjk lkeku j[kk gqvk FkkA mu tkfy;ksa esa bruk lkeku Hkjk Fkk fd vkSj lkeku j[kus dh txg ugha FkhA vfHk;qDrx.k ,d lkbZM esa cSBs Fks mu rjQ dh tkyh lkeku ls iwjh Hkjh gqbZ FkhA ;g lgh gS fd islsatj viuh lhV ds vykok Hkh b/kj m/kj lkeku j[k ldrk gSA mij tkfy;ksa esa vfHk;qDrx.k dh lhV ij j[kk lkeku fdl ;k=h dk Fkk iwNus ij ;kf=;ksa us lkeku viuk&viuk vyx crk;k ftldks [kksyus ij mlesa ls dksbZ vkifRr tud lkeku ugha feykA 15&20 vVSph

FkSys pSd fd;s FksA ge pSd djus okys 5&6 vkneh Fks] gjhfd"ku] tksxkjke vkfn Fks] lHkh flikfg;ksa us esjh fuxjkuh esa psfdax dhA 5&10 vVSfp;ka pSd dh mlds ckn vfHk;qDrx.k ds ikl ;g vQhe feyh o mlds ckn Hkh vkSj vVSfp;k pSd dh FkhA ;g cjken lkeku vfHk;qDrx.k dh lhV ij os vius ikl cxy esa ysdj lhV ij j[kk FkkA ;g ckr QnZ esa ugha fy[kh gS lhV ij esa mudh cxy ij j[kk Fkk ;|fi QnZ esa eSaus ;g fy[kk gS fd eky buds ikl Fkk rks mldk ;gh eryc gSA c;kuksa esa Hkh ;gh ckr vkbZ gS fd lkeku lhV ds ikl Fkk ftldk ;gh eryc FkkA"

7. A perusal of the above statement shows that it is not only contrary to the contents of FIR but two different versions appear in the same statement. It is submitted by him that the luggage was kept on the shelf which is above the seat and the passengers had declared their ownership with respect to their luggage. In the same tone, he stated that the luggage and bags were kept on the seat next to the accused and then stated again that it was "with" them. Thus, in the FIR, he stated that it was lying next to them whereas, in his statement, he has submitted that same was on the shelf and in the same breath, he stated that it was lying on the next to where he was sitting. Thereafter, statement of Hari Kishan - Police Constable was recorded as PW-5. As per PW-5, the said bag was lying between the feet of the accused. Thus, the statements of Shrawan Kumar, Investigating Officer PW-6 and Hari Kishan - PW-5 also do not corroborate with each other. There is major discrepancy in the statements which goes to the root of the matter.

8. It is important to establish the place where the bags were kept to prove the knowledge, conscious possession as well as ownership of the bag specially in case the recovery is from a bag in a bus with other passengers travelling in the same bus.

9. Statements of PW-3 - Madan Singh -driver of the bus, PW-2 Bhura Ram - Conductor and PW-1 Kheta Ram - owner of the hotel were recorded and all three witnesses have turned hostile. None of them have corroborated the prosecution story.

10. Moreover, it is the specific stand of the Investigating Officer that the bag was opened by a key which was in the possession of Sukh Ram. No recovery memo was prepared of the key. No such key has been produced which falsifies the very story of the prosecution. In these circumstances, statement recorded under Section 313 Cr.P.C. that they were actually arrested from a hotel early morning while having tea appears to be more probable.

11. The Apex Court in the case of State of Rajasthan v. Bhiya Ram @ Dharmendra and other connected case , Criminal Appeal No.393 of 2005 & Criminal Appeal No.394 of 2005 almost on similar facts, dismissed the appeal of the State holding that such discrepancy cannot be explained away as an error. Para 9 of the said judgment reads as under:-

"Coming to the case of Kamal Singh, according to the prosecution, he was carrying a suit case. The High Court has found that recovery of a bag from his

possession is doubtful. PW-6 Harak Lal, the constable, who entered the bus with PW-12 Sunderlal Soni, the Investigating Officer, stated in the examination-in-chief that Kamal Singh had a suit case/attache and Bhiya Ram had a bag. In the cross-examination, he stated that Kamal Singh had a cloth bag lying in his lap and Bhiya Ram had the attache lying under his feet. This is also contrary to the evidence of PW-12 Sunderlal Soni. This discrepancy cannot be explained away as an error. In the circumstances of the case, the High Court's view that the recovery of a bag from Kamal Singh is doubtful, cannot be called perverse. Having considered the evidence in it's proper perspective and having regard to the settled legal position, we are of the considered opinion that the view taken by the High Court is a reasonably possible view which should not be disturbed in this appeal against acquittal."

12. From the above, it is evident that the prosecution could not prove the case against the respondents. Thus, this Court finds no ground to set aside the impugned judgment and order dated 9.1.1990 acquitting the respondents.

13. Accordingly, the criminal appeal is dismissed.