

(2011) 09 AHC CK 0187
In the Allahabad High Court
Case No : Criminal Appeal No. 3297 of 2003

Vinay Kumar and Others

APPELLANT

Vs

State of U.P.

RESPONDENT

Date of Decision : 19-09-2011

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 20, 50,
52, 8

Citation : (2011) 09 AHC CK 0187

Hon'ble Judges : Bala Krishna Narayana, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Bala Krishna Narayana, J.—Heard Sri P.N. Dubey, learned Counsel for the Appellants and learned A.G.A. for the State.

2. The Appellants Vinay Kumar and Chandan Singh have filed this criminal appeal against the judgment and order dated 9.6.2003 passed by Special Judge, N.D.P.S. Act, Agra in Special Case No. 195 of 2002, State v. Vinay Kumar and Anr. u/s 8/20 of N.D.P.S. Act by which they have been convicted and sentenced to undergo 15 years rigorous imprisonment and fine of Rs. 1,25,000/-each and in case of default further rigorous imprisonment of 10 years each.

3. The prosecution case as is evident from the perusal of the FIR is that Dharendra Singh Yadav, SHO P.S. Saiyan, Agra received information from the informer on 5.5.2002 that Vinay Kumar and Chandan Singh were carrying on the business of selling Charas with the help of an organized gang from a shop situate in Pratap Singh Market which they had taken on rent and they had procured a large quantity of Charas which they were trying to dispose of and in case prompt action is taken they may be arrested with large quantity of Charas. The said information was communicated by S.H.O. Dharendra Singh Yadav to C.O. Khairagarh by telephone and R.T. Set and he was requested to reach Pratap

Singh market and considering the fact that any further delay in reaching Pratap Singh Market may have facilitated the escape of the accused along with the illicit Charas, Dharendra Singh Yadav along with S.I. O.P. Sagar, Constable Sushil Kumar, Constable Udairaj Singh, Constable Munnu Singh, Constable Lal Bahadur, Constable Babu Lal and Constable Shayam Singh left for Pratap Singh market by official Geep and by the time they reached Pratap Singh market C.O. Khairagarh had also arrived at the location and when the police party started moving towards the shop adjacent to the medical store in which two persons were sitting, at the pointing out of the informer, the said two persons upon seeing the approaching police party became suspicious and made an attempt to flee from the place along with the white plastic bag which was lying inside the shop but the members of the police party apprehended them after applying necessary force at about 11.00 p.m. in front of their shop. Upon being inquired the said persons gave out their names as Vinay Kumar S/o Shiv Lal and Chandan Singh S/o Shiv Lal Kushwaha. C.O. Udai Shanker requested Gyan Singh, Ram Prasad, Ram Haith and Kisan Singh who were carrying on the business of selling vegetables in the same locality to witness the search of the Appellants but they declined as a result they were searched by the Circle Officer himself in the presence of other members of the police party. The search of the Appellants lead to recovery of 21 packets of Charas from the plastic bag which the Appellants were holding, rapped in a white sheet, total weight whereof upon being measured by the weighing scale which was procured from the vegetable shop of Gyan Singh was found to be 33 kgs. Specimen seal bearing signature of S.I.O.P. Sagar was prepared on the spot, recovery memo was written by S.I.O.P. Sagar and read out to the accused by the C.O. and thereafter signed by the police personnels. The accused as well as the seized Charas were taken to P.S. Saiyan and case u/s 8/20 of N.D.P.S. Act and 2/3 of Gangster Act was registered against the accused Appellants as Crime No. 189 of 2002. The investigation was conducted by Man Bahadur Singh and C.O. Albel Singh and after completion of investigation charge sheet was filed by C.O. Albel Singh against the accused Appellants u/s 8/20 of N.D.P.S. Act in the court which was registered as Case No. 195 of 2002. The accused who were charged u/s 8/20 of N.D.P.S. Act denied the charge and claimed trial.

4. In order to prove its case the prosecution examined P.W.1 Sri Udai Shanker, C.O., S.I.O.P. Sagar as P.W.2, S.I. Dharendra Singh Yadav as P.W.3, independent witnesses Gyan Singh and Ram Prasad as P.W.4 and P.W.5., Ram Baran Singh as P.W.6, Sri Ablel Singh Dy.S.P. as P.W.7 and Man Bahadur Singh, S.O.P.W.8 who had investigated the matter and filed charge sheet.

5. Apart from oral evidence the prosecution also filed documentary evidence comprising of recovery memo Ex.Ka-1, Chik Report Ex.Ka-2, copies of G.D. entries Ex.Ka-3 and charge sheet Ex.Ka-4, report of forensic expert Ex-Ka-6. Accused Vinay Kumar and Chandan Singh during their examination u/s 313 Code of Criminal Procedure alleged false implication by the police on account of their refusal to gratify the police illegally. Pratap Singh was examined as D.W.1.

Documentary evidence was also filed on behalf of the defence which has been referred to in the impugned judgment, for showing that the accused was a licensee of Bhang. The court below after considering the entire evidence on record as well as the facts and circumstances of the case held that the prosecution had succeeded in proving the charge u/s 8/20 of N.D.P.S. Act against the accused and accordingly convicted them and sentenced them to 15 years R.I. together with fine.

6. Learned Counsel for the Appellants contended that the failure of the prosecution to explain the discrepancy in the number of packets containing offensive goods which were allegedly recovered from the plastic bag which the Appellants were carrying and the number of packets which were received by the chemical analyst conclusively establishes that the goods which were recovered from the Appellants were not sent for chemical analysis and even if the same were sent to the chemical analyst the same had been tampered with and hence, no sanctity could be attached to the report of the chemical analyst.

7. Learned Counsel for the Appellants next submitted that the two independent witnesses examined on behalf of the prosecution including Gyan Singh from whose shop the weighing scale was allegedly obtained by the members of the police party for proving the recovery and seizure of Charas from the Appellants having turned hostile and denied having witnessed the search and recovery of Charas from their possession and weighing scale having been supplied by Gyan Singh by which the weight of the seized contraband articles was taken by the Appellants, the conviction of the Appellants on the basis of the interested testimony of the police officers and constables was wholly untenable.

8. Learned Counsel for the Appellants lastly contended that there was total failure on the part of the searching officer to comply with the mandatory requirement of Section 52 of the N.D.P.S. Act at the time of the search of the Appellants which totally vitiated the search and alleged recovery of Charas from the Appellants as well as their conviction.

9. Per contra learned A.G.A. submitted that the search of the Appellants was conducted in accordance with the provisions of the N.D.P.S. Act and there was no failure on the part of the searching police officers to comply with any provision of N.D.P.S. Act. Learned A.G.A. submitted that there is no discrepancy in the number of packets of Charas which were recovered from the plastic bag belonging to the Appellants and those which were received by the chemical analyst and hence, the judgment passed by the court below is not liable to be set aside on the grounds urged on behalf of the Appellants.

10. Learned A.G.A further submitted that since the bag from which the illicit Charas was recovered was being carried by both the Appellants in their hands and neither there was any search of the persons of the Appellants and no illicit Charas was recovered from their personal search, the failure if at all by the searching officer to comply with the provisions of Section 50 of the N.D.P.S. Act

shall not vitiate the trial.

11. After having very carefully examined the submissions made by the learned Counsel for the parties and perused the impugned judgment as well as the record of the trial court, I do not find that there is any force in this appeal.

12. The submission made by the learned Counsel for the Appellant that there was discrepancy in the number of packets recovered from the Appellants and though sent for chemical analyst is without any force. A perusal of the report of the chemical analyst (copy whereof is on record as Ex.Ka-6) shows that 21 packets of suspected Charas were received by him in a sealed bag thus, there being no discrepancy in the number of packets recovered from the Appellants and those sent to the chemical analyst, the Appellants conviction is not liable to be set aside on the said ground.

13. Coming to the second ground on which the judgment of conviction has been assailed by the Appellants, namely, that the independent witnesses of the alleged recovery of Charas from the Appellants having turned hostile it was unsafe to uphold the Appellants conviction on the basis of the interested testimony of the police personal, I do not find that there is any merit in the same. The two independent witnesses, namely Gyan Singh and Ram Prasad who were examined on behalf of the prosecution to prove the recovery of illicit charas from the Appellants had neither signed the recovery memo nor they were cited as eye-witness therein. It is true that Gyan Singh in his evidence denied that the weighing scale by which the offensive goods allegedly recovered from the Appellants were weighed was taken from his shop and P.W.4 Ram Prasad also disowned the prosecution version but both the witnesses have not denied their signatures on the various documents which were prepared at the place of occurrence at the time of the search and recovery of illicit goods from the Appellants.

14. I have very carefully gone through the evidence of P.W.1 C.O. Udai Shanker and P.W.2 S.I. Dharendra Singh Yadav who were examined as witnesses of fact and I not find any inconsistency or discrepancy in their testimony with regard to the place, time and manner in which offensive goods were recovered from the Appellants which may render their evidence unreliable or unworthy of credence. The offensive goods allegedly recovered from the Appellants were produced before the trial court in a sealed state and opened before the trial court and P.W.C.O. Udai Shanker proved by his evidence that the offensive goods which were kept in the sealed bag were the same which were recovered from the Appellants. Thus despite the two independent witnesses have been turned hostile, in my opinion, the conviction of the Appellants can still be sustained on the basis of other unimpeachable evidence on record.

15. I now proceed to examine the last ground on which the Appellants have challenged the conviction i.e. the non-compliance by the searching officer with the mandatory provisions of Section 50 of the N.D.P.S. Act. Even if it is assumed

that the searching officer had failed to follow the procedure prescribed u/s 50 of the N.D.P.S. Act, in view of the admitted factual position that neither the conviction of the Appellants is based upon recovery of any contraband article as a result of their personal search nor their persons were searched by the searching officer the provisions of Section 50 of the N.D.P.S. Act are not at all attracted to the present case.

16. The offending goods were recovered from the bag which the Appellants were carrying in their hands and there was no personal search of the Appellants.

17. Thus, in view of the above, the appeal lacks merit and is accordingly dismissed.