

IN THE HIGH COURT OF DELHI AT NEW DELHI

CRL.A. No. 921 of 2005

Date of decision: May 6, 2008

BALBAN SINGH Appellant
Through Mr. Rajesh Mahajan, Amicus Curiae

versus

STATE Respondent
Through Mr. O.P. Saxena, APP

CORAM:
HON'BLE DR. JUSTICE S.MURALIDHAR

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| 1. | Whether Reporters of local papers may be allowed to see the order? | Yes |
| 2. | To be referred to the Reporter or not? | Yes |
| 3. | Whether the order should be reported in Digest? | Yes |

ORDER

Dr. S. Muralidhar, J. (open court)

1. This appeal is directed against the judgment dated 9th September 2005 passed by the learned Additional Sessions Judge ('ASJ') (Special Court), NDPS, Delhi convicting the Appellant under Section 20 of the Narcotics Drugs and Psychotropic Substances Act 1985 ('NDPS Act') and an order dated 16th September 2005 sentencing him to undergo rigorous imprisonment (RI) for a period of ten years and to pay a fine of Rs.1 lakh and in default of payment of fine to further undergo six months' RI.

2. The case of the prosecution is that on 22nd July 2002 at around 6.45

pm SI Lal Sahib (PW-2) along with Head Constable Ayaj Khan (PW-4) and Constable Mohinder Singh (PW-5) were patrolling the Old Delhi railway station. On Platform No.18 near the parcel godown, they noticed the Appellant coming from the side of main hall carrying a black colour iron box on his head. It is stated that on seeing the police the appellant tried to slip away but he was stopped and interrogated. On enquiry he revealed his name and in the meantime Ramesh Chand (PW-6), a coolie working on the platform, reached the spot. It is further stated that in the presence of PW-6 Ramesh Chand, the iron box was taken down from the head of the Appellant, the lock of the iron box was opened by its key and the box was found to be filled with *ganja*.

3. It is stated that the SI gave the appellant a notice under Section 50 NDPS Act but the Appellant declined the offer of a search before either a Magistrate or a gazetted officer. He also declined a search of the SI. It is further stated that the *ganja* recovered from the iron box weighed around 35 kg. Of this, 1 kg was separated as a sample.

4. FIR No. 225 of 2002 was registered at Police Station R.M.D. After completion of investigation, a challan was filed. The prosecution examined 12 witnesses. The trial court convicted the Appellant by accepting the case of the prosecution about the search, recovery as well as the evidence in the form of the report of the Forensic Science Laboratory ('FSL') that the seized sample tested positive for *ganja*.

5. Mr. Rajesh Mahajan, learned Amicus Curiae appearing on behalf of the Appellant, first submitted that it was mandatory that the FSL form had to be prepared at the time of recovery of the narcotic drug soon after the arrest and search. In the instant case the independent witness PW-6 had not spoken of the FSL form being prepared at the spot. The Store Register No. 19, kept at the Police Station Malkhana, contained obviously manipulated entries. It is submitted that the copy of the relevant page of the register marked as Exhibit PW3/ A reveals that the remarks column contained an entry that the sample was sent to the FSL on 13th September 2002 and that this endorsement was signed with the date 18th September 2002. However, Ex.PW 1/D, which was a photocopy of the same page of the Store Register did not contain such an endorsement. Moreover, the person who had signed the entry about dispatch of the sample to the FSL was never examined by the prosecution. He further submits that road certificate appears to be manipulated to show the dispatch of the FSL form along with the sample. Even the dates on the road certificate did not match. Relying on the judgment of this Court in *Radha Kishan v. State 87 (2000) DLT 106*, it is submitted that not sending the FSL form along with the sample was fatal to the case of the prosecution. Reliance is also placed upon the judgment in *Moolchand v. State 1993 (1) CCC 564* and *Phool Kumar v. State 1997 JCC 490*.

6. According to Mr. O.P. Saxena, learned APP appearing on behalf of the State, there was no cross-examination of the prosecution witnesses with

reference to the preparation and dispatch of the FSL form. According to him PW-9 Shri A.K. Srivastava, Senior Scientific Officer, FSL, Rohini and PW-10 Dr. Madhulika Sharma, Assistant Director, FSL support the prosecution on this point. According to PW 10, she tallied the seals on the parcel with that on the FSL form. He submits that even if the FSL form is not a part of the record it is not material as long as it can be proved through other evidence that the FSL form was prepared and sent along with the sample to the FSL for testing.

7. The trial court record contains two photocopies of the store room register (Part-I) both attested by the Assistant Commissioner of Police. The first photocopy, which is at page 167 of the record, was marked through PW-1 as Ex.PW-1/D. The entry in the relevant column of the register states: *“Aaj dinank 13.9.02 ko mukadma haza key exhibits through Constable Jitender 25B/DRP by R/CNo84/02 par FSL Malviya Nagar mein jama karaya gaya.”* (Roughly translates as ‘today, 13.9.2002, the case exhibits were deposited with the FSL Malviya Nagar through Constable Jitender 25B/DRP by road certificate R/C No. 84/02.’) This endorsement is signed by a person with the designation MHCM (whose name remains unidentified) with the date of 18th September 2002. The second photocopy of the same store room register, marked PW-3/A, is at page 105 of the trial court record. It contains a hand written sentence at the end of the above extracted sentence which appears inserted before the signature portion. This addition reads: *“Tatha FSL form bhi jama karaya gaya jo sarv mohar LSG va HSY se hai.”*

(Roughly translates as ‘And FSL form with the seals of LSG and HSY was

also deposited’). A perusal of the latter document leads to a possible inference that it is perhaps an addition. Notwithstanding there being no cross-examination on the point, when there is a glaring and obvious difference in the two documents which purport to be photocopies of the same page of a store room register, both marked as exhibits through two prosecution witnesses, it raises serious doubts on the veracity of such document. There is force in the contention of learned counsel for the Appellant that the prosecution has miserably failed to explain this crucial additional line in Exhibit PW-3/A when no such line existed in PW-1/D. He is right in pointing out the anomaly that the sentence begins with “*aaj dinank* 13.9.02” whereas it is signed on 18th September 2002. The person whose signature is found at the end of this endorsement remains to be identified. He has not been examined as a witness. PW 3 endorsed the entry of receipt of the sample from the FSL after testing. Therefore he could not have proved the entry dated 18th September 2002 that talks of the sending of the sample.

8. Mr. Mahajan is also right in pointing out that in the road certificate (Exhibit PW 3/B at page 107 of the trial court record), the words “& F.S.L. form” appear to have been added later to the line “one pulanda of cloth sealed with seal of LSY & HSY containing 1 kg ganja.” The endorsement on its reverse signed by Constable Jitender Singh reads: “Retained one sealed cloth parcel in chemistry (*sic* chemical) division.” There is no mention of any FSL form. The date under the signature of the person preparing the Road certificate reads 18th September 2002 whereas the endorsement of the

person receiving it is dated 13th September 2002. This is yet another unexplained anomaly. In the cross-examination of PW-3, a suggestion was put that no FSL form was prepared and sent with the sample, which was of course denied by the witness. These factors taken collectively lead to the conclusion that the prosecution has failed to prove the preparation and dispatch of the FSL form with the sample for testing.

9. In *Radha Kishan v. State* (supra), this Court has explained the importance of ensuring that the FSL form is duly sent with the sample for testing. IN para 26 of the said judgment, it was explained:

“26. It is normal procedure that when the incriminating articles are seized and are required to be sent to the Central forensic Science laboratory, those articles are immediately sealed and deposited at the Malkhana at the police station till they are taken out and sent to the Laboratory. In the instant case, this was not done. Contemporaneously with seizure and sealing of such articles, impression of seal used on the seal is put on a form, commonly called, the CFSL form. This is so done because at the time of analysis of sealed packets in the laboratory, the analyst concerned is able to tally seal impressions on sealed packets with those appearing on the CFSL form in order to rule out any possibility of tampering of seals on sealed packets after seizure anywhere or in transit till receipt in laboratory. **The importance of the CFSL form thus cannot be overemphasized because this document provides a valuable safeguard to an accused to ensure that no tampering has been done during intervening period.** The CFSL form is a document or forwarding note accompanying a sample sent by the police to the Forensic Science Laboratory. Such a form contains the nature of the crime, list of samples being sent for examination, nature of examination required and specimen of the seal/seals affixed on the exhibit besides particulars of the case/ police station.” (emphasis supplied)

10. In ***Radha Kishan***, after referring to the Delhi High Court Rules, Part III Chapter 18 B, regarding proper proof of custody of articles, it was held by this Court that the evidence of preparation and dispatch of the FSL form was critical for ensuring that the sealed sample was kept intact in the police malkhana. An adverse inference would be drawn against the prosecution in the event the FSL form was not proved to have been prepared and dispatched. To the same effect are the judgments in ***Moolchand*** and ***Phool Kumar***. Further, it has been held in ***Satinder Singh v. State (NCT of Delhi) 69 (1997) DLT 577***, that oral evidence which is contrary to the documentary evidence ought not to be relied upon. In the instant case, despite the prosecution witnesses asserting that the FSL form was prepared, not only is the FSL form unavailable on the record but the photocopies of the store room register and road certificate throw considerable doubts whether the FSL form was in fact prepared and dispatched. These documents are unreliable. For the above reasons, it is held that in the instant case the non-compliance with the mandatory requirement of preparation and dispatch of the FSL form with the sample sent for testing is fatal to the case of the prosecution.

11. It was next submitted by Mr. Mahajan that where there is an independent witness to the arrest and search, in the person of PW6, the seal used by the police officer to seal the pulandas containing the seized material and sample must be handed over to such the independent witness. On the contrary, Head Constable Ayaj Khan PW-4 states that “seal after use was

handed over to me I took the rukka to Police Station along with from box, sealed parcel, form FSL and copy of seizure memo.” SI Lal Sahib also confirms that “seal after use is handed over to SI Ayaj Khan.” The law in this regard has been explained by the Supreme Court in *Rajesh Jagdambha Avasthi v. State of Goa (2005) 9 SCC 773* where in para 15, it was observed: (SCC, p. 778)

“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.**” (emphasis supplied)

12. Likewise, in *Tara Chand v. State of Punjab 1997 (3) RCR 349* it was held in para 9: (RCR, p.351)

“9. Inspector Balwant Singh PW-2 is the Investigating Officer. He stated by supporting the prosecution case that 1 kilogram of opium was recovered from the person of the appellant. As per this witness after the sample was drawn and the representative sample and the rest of opium were sealed, the said seal was given to ASI Rama Shanker. On basis of this fact, it was argued that what is being stated should not be accepted from the testimonies of the official witnesses. **If Ajaib Singh public witness was present, then in normal circumstances the seal after use would be given to the independent person. If**

it is not given, there should be reasonable explanation. The said explanation is not forthcoming in the facts of the present case. In that event it leads one to presume that perhaps Ajaib Singh was not present and what is being stated by the prosecution cannot be accepted on its face value. The evidence shows that the public witness examined was unreliable having no regard for truth. The official witnesses and their testimonies cannot be accepted on their face value because they insist that Ajaib Singh was present but the circumstances indicate that what they are testifying does not appear to be so. The strict proof of establishing the case beyond all reasonable doubt is, therefore, lacking. With this cloud of doubt hovering, the appellant is entitled to the benefit of doubt. Therefore, he is entitled to an acquittal.” (emphasis supplied)

13. The next submission concerned the delay of over a month and a half in sending the seized sample for testing to the FSL. The seizure was made on 22nd July 2002 and the sample was sent for testing on 13th September 2002. The Supreme Court has in *Valsala v. State of Kerala 1993 (2) Crimes 267 (SC)* and later in *State of Gujarat v. Ismail U Haji Patel (2003) 12 SCC 29* held that the delay per se would not be material. What had to be established was that the seized articles were in proper custody and in the proper form and that the sample sent to the Chemical Analyst for testing was the same that was seized.

14. The evidence of PW-6 Ramesh Chand indicates that he was unable to say if the iron box brought to the Court was the same that was seized from the Appellant. Moreover, the iron box that was produced in the court had its locks already opened. Therefore, it is plain that the case property in the form of the iron box which contained the ganja was not kept by the prosecution in

a secure manner in the police malkhana. During the examination-in-chief of PW-6 i.e. on 22nd April 2004 the keys to the iron box were not available. After one year i.e. on 8th August 2005 the prosecution suddenly produced two keys. Still, the witness was unable to recognize them. Further this witness did not support the case of the prosecution in the crucial aspect of sealing the sample in his presence. Very importantly he states that the box was opened in his presence but locks were not opened in his presence. In the instant case since the prosecution is not able to satisfactorily establish that the seized sample was preserved in a proper form in the Malkhana, the delay of one and half months in sending the sample for testing must be held fatal to the case of the prosecution. In the circumstances, this Court is inclined to give benefit of doubt to the Appellant that the sample was sent for testing to the FSL was not the same that was seized from him.

15. The further submission was that PW-6 Ramesh Chand was in fact a stock witness for the prosecution. It is seen from the cross-examination of PW-6 that “he had appeared as a witness once, in a narcotics case.” He further stated: “he appeared as witness in some other drug case about one year back.” In *Rajesh Jagdambha Avasthi*, among other grounds, the acquittal of the accused was based on the ground that one of the panch witnesses was a stock witness. It was observed (SCC, p. 778)

“16. There is one other aspect of the matter. PW-2, the panch witness associated in this case appears to be a stock witness. The other panch witness has not been examined. PW-2 admitted in very clear terms that he was earlier associated in two other cases under the NDPS Act as panch witness. In both those cases, PSI

Thorat was the Investigating Officer. On 14.12.12994 he had been summoned by PSI Thorat and acted as a panch witness in the case against P.C. Kulbi, who as noticed earlier disclosed the complicity of the appellant. Thereafter, in the instant case, he was requested by PW-4 to act as a panch witness. It appears that PSI Thorat was also associated with this case as he was present with PW-4 when PC Kulbi was apprehended and thereafter when the appellant herein was apprehended and searched at the instance of the aforesaid Kulbi.”

16. For all the above reasons, this Court finds that the impugned judgment dated 9th September 2005 and order on sentence dated 16th September 2005 passed by the learned learned Additional Sessions Judge (‘ASJ’) (Special Court), NDPS are unsustainable in law and are, accordingly, set aside. The appeal is allowed. The Appellant shall be released forthwith if he is not required in any another case.

17. This Court would like to record its appreciation of the sincere efforts of Mr. Rajesh Mahajan, learned Amicus Curiae, in competently preparing and presenting the case of the appellant.

18. The trial court record be sent back immediately. A certified copy of order be sent to the Superintendent Jail, Tihar within five days from today.

S.MURALIDHAR, J

MAY 06, 2008

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