

Jai Yodhad Vs. State

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Court : Delhi

Decided On : Jan-30-2014

Judge : V. K. Jain

Appellant : Jai Yodhad

Respondent : State

Judgement :

* IN THE HIGH COURT OF DELHI AT NEW DELHI % Date of Decision:

30. 01.2014 + Crl.Appeal No.392/2010 JAI YODHAD Through: .Appellant Mr. Ajay Verma and Mr. Prateek, Advs. Versus STATE Through: .Respondent Mr. Feroz Khan Ghazi, APP CORAM: HON'BLE MR. JUSTICE V.K.JAIN

JUDGMENT

V.K.JAIN, J.

(Oral) On 8.7.2008, SI Sunil Jain of Narcotic Branch received secret information that a person named Jai, resident of Nepal, who is engaged in bringing Ganja from Nepal to Delhi and selling the same, in association with one Norbu, will meet Norbu between 6.30 pm to 7 pm on that date at Railway Crossing, Shalimar Village and a huge quantity of Ganja would be supplied. The aforesaid information was brought by SI Sunil Jain to the notice of Inspector M.L. Sharma of Narcotic Branch and he also produced the informer before him. After making inquiries from

the informer, Inspector M.L. Sharma brought the information to the notice of the concerned ACP Mr. M.S. Dabas on telephone. The said ACP directed him to conduct a raid as per the legal procedure. The information was then recorded vide DD No.18A of the Police Station at 5 pm and a copy was sent to the ACP. A raiding party consisting of SI Sunil Jain, HC Rajinder, HC Mukesh and Sohan Pal was then organized and equipped with field testing kit, electronic balance etc.

2. The raiding party reached the Railway Crossing, Shalimar Village at about 6.15 pm. On the way to Railway Crossing, Shalimar Village, SI Sunil Jain requested a number of passengers present at the bus stand of Ramesh Park and at Raj Ghat bus stop to join the raiding party, but no one agreed to be associated with the said party. At about 6.35 pm, the appellant Jay, accompanied by his co-accused Norbu, reached the spot. The appellant was carrying a black colour bag on his shoulder. On being identified by the secret informer, both of them were apprehended and their particulars were verified. Both of them were informed by way of a written notice that they had a legal right to be searched in the presence of a Magistrate or a Gazetted Officer and they could also search the police team as well as the police vehicle. They, however, declined to exercise their right. On search of the bag, which the appellant Jay was carrying on his shoulder, it was found to contain a polythene bag containing solid powder, which on smelling and testing with the help of field testing kit, was found to be charas. The weight of the substance as found to be 7 kg. After taking out three samples of 100 gm each and duly sealing them, the residual substance was seized after it was duly sealed with the official seal of 5BPS NB Delhi. The aforesaid seal was also affixed on FSL Form, which was filled on the spot.

3. The appellant was charged under Section 20 of NDPS Act whereas his co-accused Norbu was charged under Section 29 of the Act. Since both of them pleaded not guilty and claimed trial, as many as eight witnesses were examined. No witness was examined in defence.

4. Vide impugned judgment dated 16.11.2009, the appellant was convicted under Section 20 of the Act whereas his co-accused was acquitted. The appellant was sentenced to undergo RI for ten years and to pay a fine of Rs.20,000/- or to

undergo RI for one year in default. Being aggrieved from his conviction and the sentence awarded to him, the appellant is before this Court by way of this appeal.

5. SI Sunil Jain came in the witness box as PW6 and stated that on 8.7.2008, when he was posted at Police Station Narcotic Branch, he received secret information that Jai, a resident of Nepal, was involved in supply of charas in Delhi, in association with one Norbu, who used to bring charas from Nepal. He was further informed that Jay and Norbu would come to Shalimar Village Railway Crossing between 6.30 to 7 pm, to supply charas to someone. After verification of the informer, he produced him before Inspector M.L. Sharma and apprised him of the information. After verifying the information from the informer, Mr. M.L. Sharma informed the concerned ACP Mr. M.S. Dabas on telephone, who directed to conduct a raid. He further stated that the secret information was recorded by him vide DD No.18A, a copy of which is Ex.PW5/B and they left the police station at about 5.15 pm in a government vehicle, along with testing kit, electronic weighing scale etc. According to the witnesses, on the way to Shalimar Village, he requested four public persons present at the bus stop Ramesh Nagar as well as four public persons present at Raj Ghat bus stop, to join the raiding party, but no one agreed. Similar request was made by him to five persons from the public who were present at the spot, but they also declined to be associated with the raiding party. The witness further states that at about 6.30 pm, the appellant accompanied by his co-accused reached the aforesaid spot, carrying a polythene bag on his back. On being identified by the secret informer, both of them were apprehended. After ascertaining the name and addresses, they were briefed about the information which he had with him and also about their legal right before the search. According to the witness, notices Ex.PW1/A and PW1/B were given to the appellant as well as his co-accused and he had explained to them that it was their legal right to be searched in the presence of a gazetted officer or a Magistrate. He also claimed to have informed them that they could search the police staff as well as the government vehicle before their search was conducted. He further stated that vide his endorsement ex.PW1/C on the notice Ex.PW1/A, the appellant refused to avail the legal right of being searched in the presence of a Magistrate or a Gazetted Officer. Thereafter, he took out black colour bag, which the appellant was carrying on his shoulder and on checking the said bag, it was found to have

contained strips and a belt below those strips. There were two small packets on both the sides of the bag. There was also a main pocket with a zip in the aforesaid bag. On opening the zip of the main pocket, it was found to contain a transparent polythene, tied with rubber band, containing black colour solid substance in it. On checking the substance with the help of the field testing kit, it was found to be charas, which, on weighing was found to be 7 kg. He took samples from each strip and two samples of 100 gm each were taken out, kept in two small transparent polythene, tied with rubber band, and converted into cloth pulandas, whereas the remaining charas was kept back in the bag after tying the polythene with a rubber band. The bag was then kept in a cloth and the samples as well as the remaining substance were seized after sealing the parcel with the seal of 5BPS NB Delhi. He further stated that after reaching the police station, the documents were handed over to ASI Paramjit Singh for further investigation.

6. PW2 HC Mukesh, PW1 Ct. Rajinder corroborated the deposition of SI Sunil Jain with respect to their going to Shalimar Village, Railway Crossing, requesting the passengers present at the bus stops to join the raiding party, the appellant coming there along with his associate carrying bag on his person, giving notice to him on the spot under Section 50 of the NDPS Act and his refusal to avail the legal right available to him to be searched in the presence of a Magistrate or a Gazetted Officer, as well as seizure of the powder like substance from his bag, after drawing samples and sealing the samples as well as the residual powder with seal of 5BPS NB Delhi.

7. PW3 Ct. Rajender stated that on 14.7.2008, the MHC(M) handed over him one sealed parcel sealed with the seal of 5BPS NB Delhi and 1 SHO NBR, Delhi, with FSL form, were deposited by him in FSL on the same date. He also claimed that there was no tampering with the case property so long as it remained in his custody. PW4 HC Mahesh Kumar was working as MHC(M) at Police Station Narcotic Branch on 8.7.2008. He has stated that on the aforesaid date, Inspector M.L. Sharma had handed over three duly sealed parcels with FSL form to him duly sealed with the seal of 5BPS NB Delhi and 1 SHO NBR. He made entries in register number 19 in this regard and on 14.7.2008, one sealed parcel along with the FSL Form was sent by him to FSL, Rohini, through Constable Rajinder. Copy

of relevant entry made in register number 19 are Ex.PW4/A and PW4/B. He stated that there was no tampering with the case property till the time it remained in his custody. DW5 HC Om Prakash has stated that on 8.7.2008 when he was posted as Reader in the office of ACP, Narcotic Branch, a copy DD No.18A was received in their office and on 9.7.2008, two special reports under Section 57 of the NDPS Act were received in the said office. The photocopy of the report registered is Ex.PW5/C whereas the copies of the reports received in ACP Office are Ex.PW5/D and PW5/E respectively. PW8 Mr. M.L. Sharma stated that on 8.7.2008, when he was posted as SHO Police Station Narcotic Branch, SI Sunil Jain came to him along with secret informer at 4.45 pm and told him that Jay, resident of Nepal along with his associate Norbu, who deals in supply of charas, would come to Railway Crossing of Shalimar Village between 6.30 to 7 pm on that date. After verifying the information, he informed the ACP on telephone and was directed to conduct a raid. He further stated that at about 11.17 pm, HC Mukesh came to his office and handed over three sealed parcels having seal of 5B PS NB Delhi and he put his official seal 1 SHO NBR DELHI on all the parcels as well as FSL Form and copy of the seizure memo to HC Mahesh, who made entry in register no.19 in this regard.

8. In his statement under Section 313 Cr.P.C, the appellant denied the allegations against him and claimed that nothing was recovered from his possession and he was falsely implicated in this case. He also stated that on 8.7.2011 while he was taking lunch from the cart of Norbu Sherpa at Majnu ka tila and one person was also sitting there persons ran away on seeing the police party. After sometime, the police officials came back to his cart, gave beatings to him and thereafter he as well as Norbu were taken to police station Narcotic Branch, where their signatures were taken on some blank papers.

9. The impugned judgement has been challenged by the learned counsel for the appellant on the following grounds: a. Though the witnesses claim to have gone to the spot in a Government vehicle, the log book of the said vehicle was not produced during trial, which creates doubt with respect to the entire operation. b. No public witness was joined in the raiding party though ample time was available for associating such a witness. c. The case of the prosecution is that the bag

which the appellant was carrying had the words Open Pollar printed on it but when the bag was produced in the court, the words found printed on it were One Pollar, which shows that the aforesaid bag was replaced by the Investigating Officer.

10. In support of his first contention the learned counsel for the appellant relies upon the decision of this Court in *Eze Val Okeke @ Val Eze Vs. Narcotic Control Bureau 116 (2005) DLT399*. In the aforesaid case, the team of NCB claimed to have gone to the spot in a Government vehicle. In para 12 of the judgement it was observed that the absence of entries in the log book of the official vehicle used by the raiding party also cast a shadow of doubt on the prosecution case inasmuch as the log books are meant for recording of the movement of the vehicles and if no entries are found there, it becomes doubtful as to whether the vehicle was actually used or not as represented by the prosecution. However, in the present case though the log book has not been produced, there is nothing on record to suggest that the said log book contained no entry with respect to the raiding party visiting the place where the appellant is alleged to have been apprehended, while carrying contraband in a bag on his shoulder. In my view, mere nonproduction of the log book by itself cannot be a good ground to throw away the entire case of the prosecution even if it is proved on the basis of the evidence led by the prosecution. No doubt, had the log book been produced, that would have bolstered the case of the prosecution, but if the version given by the prosecution inspires confidence and the testimonies of the witnesses could not be assailed during their cross-examination, mere non-production of the log book of the vehicle shall not be fatal to the prosecution. In *Eze Val Okeke @ Val Eze (supra)*, the conviction was challenged by the appellant on a number of grounds including absence of entries in the log book of the official vehicle used by the raiding party. In fact, the main ground of challenge was the failure of the prosecution to establish on record that the appellant had any connection with the premises where the contraband was allegedly recovered. It was urged on behalf of the appellant that the evidence on record showed that the premises where the contraband was found was under the tenancy of one Mildred Itamere and there was no evidence to show that the appellant also was residing with her. It was further submitted on behalf of the appellant that Section 55 of NDPS Act had not been complied with and the prosecution had failed to prove that the samples or the contraband allegedly

recovered from the appellant was deposited in the Malkhana or was not tampered with, before it reached CRCL. A perusal of the judgement would show that the only public witness PW7 Sanmugam had not supported the case of the prosecution and he was declared hostile. This Court, while hearing the appeal in the aforesaid case also felt that the presence of PW5 K.L. Gauba in the raiding party was doubtful. It was also held by this Court that the prosecution had failed to connect the appellant the premises in which the contraband was recovered, besides failing to prove that the article alleged to have been recovered from him was properly sealed, preserved and then sent to CRCL for analysis. Therefore, the acquittal in that case was based on a cumulative effect of a number of drawbacks and discrepancies in the case of the prosecution, the absence of entry in the log book one of them.

11. As regards public witnesses not being joined, it has come in the deposition of prosecution witnesses that a number of persons present on the bus stops on the way to the place where the appellant was apprehended as well as several members of the public present on the spot were requested to join the police team but no one agreed to be associated with them. It cannot be disputed that the public does not want to get dragged in police and criminal case and wants to avoid them, because of long drawn trials and unnecessarily harassment. Similar view was taken in *Manish Vs. State*, 2000 VIII AD (SC) 29 and in *A. Bhai Vs. State of Gujrat*, AIR 1980 SC696 We cant be oblivious to the reluctance of common men to join such raiding parties organized by the police, lest they are compelled to attend Police Station and Courts umpteen times at the cost of considerable inconvenience to them, without any commensurate benefit. Hence, no adverse inference on account of failure to join public witnesses in such raids despite genuine efforts should be drawn. In *Ajmer Singh Vs. State of Haryana* (2010) 3 SCC746 it was contended that the evidence of the official witness cannot be relied upon as their testimony had not been corroborated by any independent witness. The Honble Supreme Court, rejecting the contention, held as under:

16. The minimum sentence prescribed under the Act is imprisonment of 10 years and fine. In this situation, it is normally expected that there should be independent evidence to support the case of the prosecution. However, it is not an inviolable

rule. Therefore, in the peculiar circumstances of this case, we are satisfied that it would be travesty of justice, if the appellant is acquitted merely because no independent witness has been produced. We cannot forget that it may not be possible to find independent witness at all places, at all times. The obligation to take public witnesses is not absolute. If after making efforts which the court considered in the circumstances of the case reasonable, the police officer is not able to get public witnesses to associate with the raid or arrest of the culprit, the arrest and the recovery made would not be necessarily vitiated. The court will have to appreciate the relevant evidence and will have to determine whether the evidence of the police officer was believable after taking due care and caution in evaluating their evidence.

Rejecting a similar contention in *Kashmiri Lal Vs. State of Haryana* (2013) 6 SCC595 the Honble Supreme Court inter alia observed as under:

9. .it is evincible from the evidence on record that the police officials had requested the people present in the 'dhaba; to be witnesses, but they declined to cooperate and, in fact, did not make themselves available. That apart, there is no absolute command of law that the police officers cannot be cited as witnesses and their testimony should always be treated with suspicion. Ordinarily, the public at large show their disinclination to come forward to become witnesses. If the testimony of the police officer is found to reliable and trustworthy, the court can definitely act upon the same. If in the course of scrutinising the evidence the court finds the evidence of the police officer as unreliable and untrustworthy, the court may disbelieve him but it should not do so solely on the presumption that a witness from the department of police should be viewed with distrust. This is also based on the principle of quality of the evidence weighs over the quantity of evidence. These aspects have been highlighted in *State of U.P. v. Anil Singh* 1988 Supp SCC686 *State, Govt. of NCT of Delhi v. Sunil and another* (2001) 1 SCC652 and *Ramjee Rai and others v. State of Bihar* (2006) 13 SCC229 Dealing with a similar contention in *Ram Swaroop Vs. State (Govt. NCT) of Delhi* 2013 (7) SCALE407 where the alleged seizure took place at a crowded place yet no independent witness could be associated with the seizure, the Apex Court inter alia observed as under:

7. We may note here with profit there is no absolute rule that police officers cannot be cited as witnesses and their depositions should be treated with suspect. In this context we may refer with profit to the dictum in State of U.P. v. Anil Singh 1988 Supp SCC686 wherein this Court took note of the fact that generally the public at large are reluctant to come forward to depose before the court and, therefore, the prosecution case cannot be doubted for non-examining the independent witnesses.

9. In Ramjee Rai and others v. State of Bihar (2006) 13 SCC229 it has been opined as follows:

26. It is now well settled that what is necessary for proving the prosecution case is not the quantity but quality of the evidence. The court cannot overlook the changes in the value system in the society. When an offence is committed in a village owing to land dispute, the independent witnesses may not come forward.

10. Keeping in view the aforesaid authorities, it can safely be stated that in the case at hand there is no reason to hold that non-examination of the independent witnesses affect the prosecution case and, hence, we unhesitatingly repel the submission advanced by the learned counsel for the appellant.

Therefore, no adverse inference can be drawn against the prosecution on account of the inability of the raiding party to join public witnesses. It is not as if no effort was made by them in this regard. They did make efforts at several places but no member of the public agreed to be associated with them.

12. As regards discrepancy in the name printed on the bag, the same, in my view, is absolutely inconsequential. Anybody could have committed a bona fide mistake in reading the word One Pollar as Open Pollar. In any case, what is material is the contraband found in the bag and not the bag itself. It has come in evidence that samples were taken on the spot, out of the substance found in the bag and the samples and the remaining substance were duly sealed. As noted earlier, the prosecution has also proved that there was no tampering with the sealed parcels till the samples reached FSL. On chemical analysis of the samples in FSL it was

found to be charas. It, thus, duly stands proved that the substance which the appellant was carrying in a bag on his shoulder, was charas only.

13. I also find that the prosecution proved due compliance of the provisions of Sections 42 & 50 of the NDPS Act. A perusal of the notice Ex.PW1/A which the appellant himself acknowledged vide his signatures at point C on it, would show that the appellant was specifically informed, by way of the said notice that it was his legal right to be searched in the presence of a Gazetted Officer or a Magistrate. Vide hand written reply Ex.PW1/C on the bottom of the said notice, the appellant, after being apprised of his legal right and understanding its import, clearly stated that he did not want to be searched in the presence of a Gazetted Officer or a Magistrate and also did not want to search members of the police team or the Government vehicle. The signatures of the appellant on the aforesaid reply appear at point C on the aforesaid reply. A carbon copy of the aforesaid notice was found in the personal search of the appellant conduct vide memo Ex.PW1/C, which clearly shows that the said notice was duly received by him. Section 42 of the Act required PW6 SI Sunil Jain to record the information in writing and send its copy to his immediate official supervisor within 72 hours. In the present case the secret information was brought to the notice of Inspector M.L. Sharma and then to the notice of the concerned ACP, before the raiding party was organized. The information was duly recorded vide DD No.18A as soon as the ACP directed organizing a raiding party. Therefore, the provisions of Section 42 of the Act were duly complied with.

14. The depositions of PW6 S.I. Sunil Jain, PW2 Head Constable Mukesh and PW1 Constable Rajinder, all of whom have corroborated each other on all the material particulars, proves beyond reasonable doubt that the appellant possessed contraband in the bag which he was carrying on his shoulder. The samples when examined in the laboratory were found to be charas. The entire link has been duly proved by the prosecution. It has come in the depositions of PW6, PW2 & PW1 that the samples drawn from the substance found in the bag, which the appellant was carrying on his shoulder, were duly sealed with the seal 5BPS NB Delhi. The residual product was also sealed with the same seal. The parcels duly sealed with the aforesaid seal were produced before PW8 Inspector M.L. Sharma on the same

date and then then put his own seal 1 SHO NBR on them and handed over those parcels, along with FSL Form which was also duly sealed with both the aboverferred seals, to PW4 Head Constable Mahesh Kumar who kept, them in his custody and later sent the samples to CFSL through Constable Rajinder on 14.7.2008. The relevant entries made in register No.19 kept in the police station have been duly proved and Ex.PW4/A and PW4/B. The report of FSL would show that the sealed parcels containing samples of the product recovered from the appellant were duly sealed with the seals 5BPS NB Delhi and 1 SHO NBR when they were received in the laboratory. Thus, the prosecution has duly proved that there was no tampering with the samples or the case property at any point of time.

15. For the reasons stated hereinabove, I find no ground to interfere with the conviction of the appellant under Section 20 of the Act. The quantity found in the possession of the appellant being 7 kg. was a commercial quantity. The appellant having been sentenced to undergo RI for ten (10) years, which is the minimum sentence prescribed for the aforesaid offence there is no scope for reduction of the sentence awarded to him. The appellant was also sentenced to pay fine of Rs.20,000/-. There is no scope for reduction of the fine. However, in the facts & circumstances of the case, it is directed that in the event of failure to pay fine, the appellant shall undergo RI for one (1) month instead of one (1) year as awarded by the trial court. The appeal stands disposed of. One copy of this order be sent to the concerned Jail Superintendent for information and necessary action. The trial court record be sent back along with a copy of this order. JANUARY30 2014/rd/bnesh V.K. JAIN, J.

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