Ajay Kumar Vs. State

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Court : Delhi

Decided On : Oct-05-2015

Judge : The Honourable Ms. Justice Indermeet Kaur

Appeal No. : CRL.A. No. 389 of 2012

Appellant : Ajay Kumar

Respondent : State

Judgement :

1. This appeal is directed against the impugned judgment and order on sentence dated 07.02.2012 and 14.02.2012 respectively wherein the appellant stands convicted under Section 21-C of the Narcotic Drugs and Psychotropic Substances Act (hereinafter referred to as the said Act'). He had been sentenced to undergo RI for a period of 12 years and to pay a fine of Rs.3 lacs and in default of payment of fine to undergo RI for a period of one year.

2. The nominal roll of the appellant reflects that as on date, he has undergone incarceration of 5 years and 9 months; remission being inapplicable to a convict under the said Act. Fine has not been paid.

3. The version of the prosecution is that on 29.12.2009 at about 05:30 pm near the Shastri Park Majar, the accused was found to be in illegal possession of 270 gms of heroin; this contained 1% diacetylmorphine which was the unlawful contraband. This recovery had been effected pursuant to a secret information which had been

recorded in the police station. A raiding party had been constituted comprising of constable Satpal (PW-3), HC Mahesh (PW-11) and SI Bhagwan Singh (PW-12). Before search of the accused had been effected, notice under Section 50 of the said Act (Ex.PW-3/A) was served upon him. He was informed that he could get his search conducted either before a Gazetted Officer or before a Magistrate; the option was declined. Total contraband recovered was 270 gms. Two samples of 5 gms each was drawn from the contraband; they were separately seized and sealed. The case property was deposited with the malkhana mohrar by HC Parvinder (PW-6). Drawn samples were sent to the CFSL for analysis which had tested positive for heroin.

4. The accused had pleaded innocence in his statement recorded under Section 313 of the Cr.PC. No evidence was led in defence. Crl. Appeal No.389/2012 Page 3 of 14

5. On the basis of the aforenoted evidence, both oral and documentary, the appellant was convicted and sentenced as aforenoted.

6. The foremost submission of the learned counsel for the appellant is that the quantity which has been recovered from the appellant was admittedly 270 gms out of which only 1% was heroin; this has clearly been recorded in the judgment and this was pursuant to the report furnished by the CFSL. 1 % heroin was 2.7 gms and would fall within small quantity in terms of notification dated 19.10.2001 (appended to the said Act); the Trial Judge relying upon a subsequent notification dated 18.11.2009 has committed an illegality. This notification dated 18.11.2009 could not have been relied upon as in the absence of an amendment in the said Act, this Notification could not have formed the basis to return a finding that the recovery of 2.70 gms amounts to a commercial quantity. In furtherance of this argument, learned counsel for the appellant submits that the said Act had been amended in 2001 (Amendment Act of 2001). The Objects and Reasons of this amending provision clearly evidence that the uniform punishment of minimum of 10 years RI extendable up to 20 years was sought to be rationalized and accordingly the sentence structure was rationalized by this amendment so as to ensure that while drug traffickers who traffic significant quantities of drugs are

punished with a deterrent sentence, the addicts and those who commit less serious offences are sentenced to a less severe punishment. It was in this background that the definition of žcommercial quantity Ÿwas laid down by this amending provision and the Notification specifying a small and a commercial quantity was envisaged. Attention has been drawn to Sr. No. 56 of the said Table wherein heroin has been enlisted; submission being that a commercial quantity of heroin diacetylmorphine is 250 gms and more and a quantity below 5 gms falls within the bracket of a small quantity ?. The conviction of the appellant for a commercial quantity is illegal and ill-founded. To support this submission reliance has been placed upon AIR 2008 SC 1720 *Micheal Raj Vs. Intelligence Officer, Narcotic Control Bureau*. The second argument of the learned counsel for the appellant is his submission that inspite of the opportunity having been available with the members of the raiding party to join the public witnesses, no sincere efforts were made to do so and on this count, attention has been drawn to the versions of PW-11 and PW-12. There is also no explanation as to why the driver of the vehicle had not been made a witness; all members of the raiding party have also not been examined. To support this line of argument, reliance has been placed upon a judgment of a Bench of this Court in Crl. Appeal No. 302/2008 dated 25.04.2011 *Radhey Shyam Vs. The State (NCT of Delhi)* wherein the Bench of this Court had noted that where sincere efforts had not been made by the Investigating Officer to ask members of the public to join the raid inspite of the fact that there were nearby shops, a benefit of doubt had been accorded in favour of the accused. The third argument pressed by the learned counsel for the appellant is based on his submission that there was inordinate delay in sending the samples to the CFSL. The case property was seized on 29.12.2009 and was deposited in the malkhana on the same day but as per the version of the malkhana mohrar (PW-6), the samples were sent to the CFSL for the first time only on 06.01.2010. This delay remains unexplainable. Submission being that as per the instructions of the Narcotic Control Bureau, sealed parcels should be deposited with the chemical examiner within 72 hours and there being no justification for this unexplainable delay, a benefit of doubt on this count also accrues in favour of the appellant. To support this submission reliance has been placed upon a judgment of this Court reported as 757/2000 dated 01.05.2008 *Rishi Dev @ Onkar Singh Vs. State* as

also another judgment of a Bench of this Court reported as Crl. Appeal No. 1555/2011 dated 01.09.2015 *Thomas Karketta Vs. State Through Narcotics Control Bureau*. Additional submission being that the notice under Section 50 of the said Act was also not a true compliance of the said provision as the reply of the appellant has been written in Hindi for which there is again no explanation as admittedly the appellant was as educated man and nothing prevented him from writing his answer in the language which he knew, which was the English language. This is also another reason for his acquittal.

7. Arguments have been refuted. Learned counsel for the State has drawn attention of this Court to the Notification dated 18.11.2009 which was gazetted on that date and which had been relied upon by the Trial Judge to hold that it is not the purity of the content of the sample which has to be taken into account but the entire drug to determine whether the contraband falls within a small quantity or a commercial quantity. On the second submission, it is submitted that where public witnesses are not joined and if the testimony of the police witness is cogent and coherent, there is no reason as to why reliance cannot be placed upon the version of the police witness. Even otherwise, attempt to join public witnesses had been made and this is clear from the testimony of the Investigating Officer (PW-12). There is also no delay in sending the sample; such a procedural irregularity cannot vitiate the trial. Reliance has been placed upon a judgment reported as 2011 Law Suit (Del) 51 *Bilal Ahmed Vs. State*. Mandate of Section 50 of the said Act has also been fully complied with. On no count, does the impugned judgment call for an interference.

8. Arguments have been heard. Record has been perused.

9. Admittedly the contraband which had been recovered from the appellant was heroin and when weighed it was found to be 270 gms and as per the report of the chemical examiner, the percentage of diacetylmorphine was 1%. This has been discussed in para 21 of the impugned judgment. Reliance by the learned counsel for the appellant on the judgment of *Micheal Raj* (supra) is however misplaced. Although in this case the Apex Court had discussed the intent of the Legislature in the rationalization of the sentence structure for drug trafficking and the Amending

Act of 2001 in that context had been the subject matter of debate for which the entry in the Notification dated 19.10.2001 was the basis of the finding returned that the quantity of 60 gms which was the purity content of the total contraband would fall in the mid bracket. This Court notes that after this judgment which was delivered on 11.03.2009, the Notification of the Ministry of Finance dated 18.11.2009 was gazetted.

10. The Notification dated 18.11.2009 issued by the Ministry of Finance, Department of Revenue reads herein as under:-

MINISTRY OF FINANCE

(DEPARTMENT OF REVENUE)

NOTIFICATION

NEW DELHI, THE 18TH NOVEMBER, 2009

S.O. 2941(E) " In exercise of the powers conferred by clause (vii a) and (xiii a) of section 2 of the Narcotics Drugs and Psychotropic Substance Act 1985 (61 of 1085), the Central Government hereby makes that following amendment in the Notification S.O 1055 (E), dated 19.10.2001, namely:-

In the table at the end after Note 3, the following Note shall be inserted, namely:

(4) The quantities shown in column 5 and column 6 of the Table relating to the respective drugs shown in column 2 shall apply to the entire mixture or any solution or any one or more narcotic drugs or psychotropic substances of that particular drug in dosage form or isomers, esters, ethers and salts of these drugs, including salts of esters, ethers and isomers, wherever existence of such substance is possible and not just its pure drug content. ?

(F. No. 66/33/2008-NC.1)

VIMLA BAKSHI, Under Secy. ?

11. This Notification has been issued by the Ministry of Finance in exercise of the powers conferred under Section 2 of the said Act by virtue of which the Central Government had issued the said Notification. The earlier Notification dated 19.10.2001 stood amended by this Notification and the language of this Notification with clarity specifies that it is not the percentage of the drug which has to be taken into account to determine as to whether it falls within the bracket of a small or a commercial quantity but the entire mixture of the narcotic drug/psychotropic substance and not its pure drug content alone to return a finding as to whether the recovered contraband is in the bracket of a small quantity or a commercial quantity. The Notification being published and having amended the earlier notification dated 19.10.2001 (relied upon in the judgment of *Michael Raj)*, the submission of the learned counsel for the appellant that the Trial Judge had committed an illegality in relying upon this Notification and holding that the drug recovered from the appellant was in the commercial quantity is an argument noted to be rejected. The recovered contraband which was 270 gms of heroin was a commercial quantity haul.

12. The members of the raiding party were examined as PW-3, PW-11 and PW-12. PW-3 had deposed that PW-12 had constituted a raiding party comprising of PW-12, PW-3 and PW-11 as also constable Sohan Pal. This was pursuant to a secret information received by PW-12. On the apprehension of the appellant, PW-12 introduced himself to the appellant. Before taking his search, notice under Section 50 of the said Act (Ex.PW-3/A) was served upon him. The raid was effected at about 05:45 pm and this was at the Shastri Park Majar. In one part of his cross-examination, PW-3 has admitted that the police booth was close by and SI Bhagwan Singh did not call any person from the public to join the raid. He however deposed that SI Bhagwan Singh had made efforts to join the public but none agreed. He denied the suggestion that no recovery was effected from the accused. The second member of the raiding party was PW-11. He has deposed that before taking search of the accused, PW-12 had asked 7-8 persons who had gathered there to join the proceeding but none had agreed and they left the place without disclosing their names and addresses. The search was conducted upon the accused person thereafter. The version of PW-12 is also to the same effect. He has also deposed that he had asked the passersby to join the proceeding but

none had agreed and they left the place without disclosing their names and addresses.

13. All members of the raiding party i.e. PW-3, PW-11 and PW-12 are consistent on this factum that the members of the public had been asked to join the raid but none had agreed. It is also a matter of common knowledge that public persons tend to avoid these proceedings and there are hardly any volunteers; procedure being long drawn out and the follow up even longer when the persons are summoned in the Court. Testimony of the police witnesses, if cogent and coherent cannot be discarded only on this score that the members of the public had not joined the raid.

14. In this context, the observations of a Bench of this Court reported as *Tahir v. State (Delhi) (1996) 3 SCC 338,* are relevant; they read as under:-

6. ...In our opinion no infirmity attaches to the testimony of the police officials, merely because they belong to the police force and there is no rule of law or evidence which lays down that conviction cannot be recorded on the evidence of the police officials, if found reliable, unless corroborated by some independent evidence. The Rule of Prudence, however, only requires a more careful scrutiny of their evidence, since they can be said to be interested in the result of the case projected by them. Where the evidence of the police officials, after careful scrutiny, inspires confidence and is found to be trustworthy and reliable, it can form basis of conviction and the absence of some independent witness of the locality to lend corroboration to their evidence, does not in any way affect the creditworthiness of the prosecution case. ?

15. The case property had been seized on 29.12.2009 and had been deposited in the malkhana on the same day. This is clear from the version of PW-6. He had made entry in Register No. 19 (Ex.PW-6/A) on 06.01.2010 and on the directions of the SHO, PW-6 had sent the sample parcels along with FSL form through constable Sohan Pal (PW-2) to the CFSL vide RC No.3/21. This factum has also been corroborated by PW2. The road certificate has been proved as Ex.PW-2/A. PW-2 has categorically deposed that till the parcel remained in his custody, it was not tampered with in any manner. This Court notes that it is not the argument of

the learned counsel for the appellant that delay in sending the sample has caused any prejudice to him; it is not his argument that the samples have been tampered with. In this case, there is a delay of 9 days in sending the samples to the CFSL. The CFSL has also reported that at the time the samples were received at their office, the seals on the samples were intact. This was largely attributable to the administrative exigencies. Thus this delay of 9 days in sending the sample by the prosecution to the CFSL cannot in any manner be termed as fatal. The judgment relied upon by the learned counsel for the appellant reported as *Rishi Dev* (supra) on this score is inapplicable; the delay in that case in sending the samples to the CFSL was of 3 months and for which the explanation furnished by the Department was false.

16. A Bench of this Court in the judgment of *Bilal Ahmad* (supra) had noted that mere delay in sending the samples to the CFSL where the seals were intact and tallied with the specimen seals would be no ground to hold that the accused was entitled to a benefit of doubt on this count as such a delay would not be fatal to the version of the prosecution.

17. Notice under Section 50 of the said Act (Ex.PW-3/A) was served upon the appellant before his search was conducted. The reply is in Hindi wherein the appellant has refused to get his search conducted either before a Gazetted Officer or a Magistrate. The submission of the learned counsel for the appellant that the appellant was an educated man and he could have well written in English is negatived by the testimony of the members of the raiding party. PW-3 has categorically stated that except for knowing how to sign in English, the appellant did not know how to write. PW-11 has categorically stated that prior to service of notice under Section 50 of the said Act, contents of the notice were read over and explained to the accused. PW-12 has categorically stated that the accused was semi-literate and except for signing his name in English, he did not know how to write.

18. On no count, does the impugned judgment call for any interference. The conviction of the appellant for having found in illegal and unlawful possession of the commercial quantity (270 gms of heroin) stands fully proved. He has been

sentenced to undergo RI for a period of 12 years. This Court is however inclined to modify the sentence. Noting that the appellant is a first time offender with no other criminal background, his sentence is modified from RI 12 years to RI 10 years which is the minimum punishment legislated for a conviction under Section 21-C of the said Act. The fine amount is also reduced from Rs.3 lacs to Rs.1.5 lacs. In default of payment of fine, the appellant will undergo RI for a period of 6 months.

19. Appeal disposed of in the above terms.