

State of M.P. Vs. Ghanshyam

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Court : Madhya Pradesh

Decided On : Jul-20-2007

Reported in : 2008CriLJ107

Judge : S.L. Kochar, J.

Appellant : State of M.P.

Respondent : Ghanshyam

Judgement :

S.L. Kochar, J.

1. The State has filed this appeal after grant of leave by this Court against the impugned judgment of acquittal of the respondent, passed by 2nd Additional Sessions Judge, Mandsaur in Session Trial No. 205/93, judgment dated 29th March, 1994.

2. Briefly stated the prosecution case as unfolded before the Trial Court is that on 21-3-1993 Station House Officer, Police Station, Daloda received information from Mukhbir that respondent Ghanshyam was coming with opium on Rajdoot motorcycle bearing registration No. MP- 14-A-3634 to his resident. Station House Officer called Panch witnesses Pralhad and Mukesh and made them aware about Mukhbir report. He also sent intimation to this effect to the Addl. S. P. Mandsaur. The Station House Officer/Vijay Choudhari along with Panch witnesses and other

police officials with Manohar Soni having weighing instrument reached near the house of the respondent in the night at about 1.30 a.m. Respondent came on motorcycle and was stopped outside the house by the police. The respondent put motorcycle on stand in front of his house. He was made aware of Mukhbir information and after completing usual formalities of search proceeding, motorcycle of the respondent was searched and opium was found in the dickey of motorcycle, which was 5 kg. 500 gm. The opium was weighed by witness Manohar Soni. Two samples were sealed separately and rest of the opium was also sealed after completing the procedure of search and seizure. The respondent was arrested and brought to Police Sahayata Kendra, Daloda, where the offence was registered as 0/93 Under Section 8/18 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (herein after referred to as 'NDPS Act' for brevity) and thereafter, FIR was registered vide crime No. 54/93 in main police station, Bhavgarh. The seized contraband article was sent for chemical examination and its report received by the police was Exhibit-P/34. On due investigation, respondent was charge-sheeted for commission of offence punishable Under Section 8/18 of the NDPS Act.

3. Respondent denied the charges and his defence was that he was falsely implicated, because he made complaint against in-charge of police Chowky, Daloda and other police officials on 5-3-1993 regarding giving protection to the persons involved in Satta and sale of illicit liquor. He filed Exhibit-D/3, but did not examine any witness. On the other hand, prosecution has examined as many as 12 witnesses and got proved 34 documents to prove its case. The learned Trial Court acquitted the respondent by the impugned judgment. Hence, this appeal filed by the State.

4. Learned Counsel for the State has submitted that the acquittal is based mainly on three grounds.

(1) Non-compliance of mandatory provision of Sections 42 and 57 of the Act.

(2) FSL report Exhibit-P/34 could not read in evidence without examining chemical analyzer or author of the said report.

(3) That the Panch witnesses, independent witnesses Pralhad (P.W. 2) and Mukesh (P.W. 5) have not supported prosecution case and testimony of Investigating Officer Vijay Choudhari (P.W. 8) and head constable Amrutlal are not sufficient to place reliance.

5. Learned Counsel has submitted that Section 42 of the Act would not be attracted in the present case, because search was outside the house in a public place. Apart from this, according to him, there is sufficient compliance of the provision of Section 42 of the NDPS Act by the Investigating Officer and that the learned trial Court has not considered correct interpretation, in proper prospect of Section 293 of the Cr.P.C. wherein the chemical analyzer report Exhibit-P/34 is admissible in evidence without examination of the chemical analyzer or author of the report. The learned Counsel has submitted the photostat copy of the order dated 4th December, 2002, whereby the State Government (Home Department) has granted permission to FSL, Sagar to open and run regional FSL at Indore, Raipur and Gwalior. (This document is taken on record.) The learned Counsel for the respondent has not controverted genuineness of this document and that there is no hard and fast rule that testimony of police officials cannot be relied upon for basing conviction. The learned Counsel has placed reliance on the judgments rendered by Supreme Court and High Courts in Ravindran alias John v. Superintendent of Custom : 2007 CriLJ3414 , Ramdayal v. CNB, Gwalior 1992 MPLJ full bench, 834 : 1993 Cri LJ 1443, Union of India v. Major Singh 2006 Volume-9 SCC 170, State of Hariyana v. Jarnail Singh : 2004 CriLJ2541 , State of Punjab v. Balbir Singh : 1994 CriLJ3702 , Natthusingh v. State of M.P. : 1974 CriLJ11 , Krishnakumar Narayan Prasad Jaiswal v. State of M.P. 2000 volume 3 MPLJ 447, Khalek Shaikh v. State of West Bengal : (2006)7SCC439 .

6. On the other hand, learned Counsel for the respondent has supported the impugned judgments and findings arrived at by the learned trial Court and placed reliance on Supreme Court judgment in case of Bahadursingh v. State of M.P. 2002 volume 1 EFR 460 : 2002 Cri LJ 579, State of West Bengal v. Babu Chakraborty 2004 volume 2 EFR 521 : 2004 Cri LJ 4858.

7. Having heard the learned Counsel for the parties and after perusing the entire record, this Court is of the considered view that the learned Trial Court has wrongly held that FSL report, Exhibit P/34 is not admissible in evidence, because the author of the report has not been examined in the Court while placing reliance on the judgment rendered by learned single Judge of this High Court in case of Mehmood v. State of M.P. 1989 Cr LR MP 426. In the judgment, the analysis report was given by Government Opium and Alkaloid Works, Neemuch, (MP). Section 293 of the Cr. P.C. reads as under:

(1) Any document purporting to be a report under the hand of a Government scientific expert to whom this section applies, upon any matter or thing duly submitted to him for examination or analysis and report in the course of any proceeding under this Code, may be used as evidence in any inquiry trial or other proceeding under this Code.

(2) The Court may, if it thinks fit, summon and examine any such expert as to the subject-matter of his report.

(3) Where any such expert is summoned by a Court and he is unable to attend personally, he may, unless the Court has expressly directed him to appear personally, depute any responsible officer working with him to attend the Court, if such officer is conversant with the facts of the case and can satisfactorily depose in Court on his behalf.

(4) This section applies to the following Government scientific experts, namely-

(a) Any Chemical Examiner or Assistant Chemical Examiner to Government.

(b) The Chief Controller of Explosives.

(c) The Director of the Finger Print Bureau

(d) The Director, Haffkeine Institute, Bombay

(e) The director (Deputy Director or Assistant Director) of a Central Forensic Science Laboratory or a State Forensic Science Laboratory.

(f) The serologist to the Government.

(g) Any other Government Scientific Expert specified by notification by the Central Government for this purpose.

8. In Section 293 Sub-section 4(a) of the Cr. P.C. the expert report given by chemical examiner or assistant chemical examiner to government is admissible without examining the expert. This clause is an independent clause, wherein chemical examiner or assistant chemical examiner is posted anywhere in Government Laboratory. His report can be used in evidence. In the instant case, analysis report Exhibit-P/34 is issued by Prakashchandra Dube, assistant chemical examiner to Government of M. P. and there is countersign of technical assistant Vinod Kumar. In Section 293 Sub-section 4(a) of the Cr. P.C. the place of working of chemical examiner or assistant chemical examiner is not mentioned. The only requirement is that the report must be given by chemical examiner or assistant chemical examiner to Government (Emphasis supplied) (Not found in certified copy....Ed.). The learned trial Court has failed to consider this aspect and incorrectly held in paragraph 7 that in Section 293 Sub-section 4(a) of the Cr. P.C, there is no mention of the Office of Regional FSL, Indore. In the instant case, the ratio decidendi in case of Mahmood (*supra*) is not applicable. In the said case, the report was given by Opium and Alkaloid Works, Neemuch, (MP). It is not clear from the facts that 'Whether the report was given by chemical examiner or assistant chemical examiner or not 'Full Bench of this High Court in case of Ramdayal 1993 Cri LJ 1443 (*supra*) had occasion to deal with the question that in a case under NDPS Act, only report given by the Government Opium and Alkaloid Works, Neemuch & Gajipur Laboratories (MP) is admissible as held in case of Sheru v. State of M.P. (1990) Cr Law Reporter MP 194 and the Full Bench had held that analysis can be made at any laboratory of the Government in the country to expedite investigation. Rule (2)(c) of the NDPS Rules, 1985 defining chemical examiner and name of Neemuch and Gajipur as places, where Government Opium and Alkaloid Works is mentioned, is only for the purpose of Chapter 3 of the said Rule for analysis of sample of opium lawfully cultivated and produced and the judgment rendered in case of Sheru (*supra*) has been overruled. In the instant case, chemical analysis report Ex-hibit-P/34 has been given by the Regional FSL,

Indore, which was opened in view of the order dated 4 December, 1992 passed by the State Government. Court can take judicial notice of this fact as per provision Under Section 56 & 57 of the Evidence Act.

9. In this view of the matter, learned trial Court has illegally discarded the chemical analysis report of the seized contraband article vide Exhibit-P/34, which is one of the main ground for acquittal of the respondent.

10. Now, the next question, whether there is non-compliance of mandatory provision of Section 42 & 57 of the Act by Investigating Officer as held in paragraph 13 of the impugned judgment. Compliance of Section 57 of the Act is not mandatory and it is directory. Three Judges Bench of Supreme Court in case of Sajan Abraham v. State of Kerala 2001 Cri LJ 4002 has held that Section 57 of the Act is not mandatory, therefore if substantial compliance of it is made, it would not vitiate prosecution case. This has also been held in the celebrated leading judgment passed in case of State of Punjab v. Balbir Singh : 1994 CriLJ3702 . In the instant case, (P.W. 3) Karesingh, Reader to Additional S.P. Mandsaur has proved receipt of information Exhibit-P/14 from Police Out-Post, Daloda and he placed the same before Addl. S.P. Mandsaur. He also proved receipt of memorandum Exhibit-P/3 as well as intimation regarding seizure of opium Exhibit-P/15 and same was placed by him before Addl. S.P. Mandasaur. The learned trial Court, in paragraph 13 has given incorrect finding contrary to the statement of this witness (P.W. 3) Karesingh that 'In fact, prosecution has failed to prove that such report Exhibit-P/3, P/13 & P/14 were really placed for the information and knowledge before the senior police officials'. (P.W. 3) Karesingh has specifically stated in paragraph-1 & 4 as well as paragraph-8 of cross-examination that he placed all the documents vide Exhibit-P/14, P/3 & P/15 for perusal before Addl. S.P. Mandsaur. This is sufficient compliance of Section 57 of the Act and the appellant is not entitled for getting any benefit. (P.W. 12) Investigating Officer Vijay Choudhari has specifically stated that copy of secret information and copy of memorandum for not obtaining search warrant were sent to Addl. S.P. Mandsaur through constable Ravi Shankar-Number 503. Both the documents are Exhibit-P/14 & P/3. He has also stated in paragraph 17 that through document Exhibit-P/15, he had sent intimation of registration of the crime to Addl. S.P. Mandsaur.

11. In the instant case, Section 42 of the NDPS Act would not be attracted, because respondent was apprehended outside the house by the police. The search of the house was not taken. It was a public place, for which Section 43 of the Act will apply, which does not require the information of any person to be taken out in writing. Section 43 of the Act is meant for seizure and arrest of the accused in public place. Section 42 of the Act is applicable to a case where the concerned officer on information received or having reason to believe from personal knowledge that any offence has been committed in relation to any drug or psychotropic substance etc. and which is kept or concealed in any building conveyance or enclosed place may between sun rise and sun set and searched the building conveyance or places. This aspect has dealt with in detail by Supreme Court in case of Ravindran alias John v. Superintendent of Custom : 2007 CriLJ3414 . In paragraphs 5 & 6, the learned Trial Court, in the impugned judgment has not at all discussed the evidence for attracting Section 42 of the Act and in paragraph 13, the Court has given flying remark that mandatory provision of Section 42 of the Act has not been complied with by the prosecution. This is a clear perversity in the impugned judgment. The learned trial Court, before holding non-compliance of Section 42 of the Act, should have dealt with the evidence adduced by the prosecution.

12. Both the witnesses (P.W. 2) Prahlad and (P.W. 5) Mukesh have not supported the prosecution case, therefore, declared hostile and cross-examined, Amrutlal (P.W. 8), head constable has deposed in paragraph 8 that the respondent was found standing in front of his house with motorcycle and was searched. On search of his motorcycle, from dickey, 5.500 Kg. Opium was seized. Opium was weighed by Manoharlal Soni (P.W. 4), who was taken by the police along with them after receiving information from informant. Further, in cross-examination, in paragraph 9, this witness has specifically stated that when the police party along with Panch witnesses reached near the house of the respondent, the respondent had also reached near his house on his motorcycle and when he was about to take his motorcycle inside his house, he was stopped and interrogated. It was night at about 1.30 a.m. This witness has given detailed statement about other proceedings right from receipt of secret information and he has also stated in paragraph 18 that there was open ground or land in front of the house of the

appellant and his house was surrounded by some other houses. It was residential locality. The statement of this witness is very clear that the respondent was apprehended outside the house in open ground. On this aspect, the statement of this witness Ravi Shankar Dube is completely in line with the statement of Investigating Officer (P.W. 12) Vijay Choudhari.

13. The Investigating Officer has also stated that the respondent was stopped outside his house, when he was trying to enter inside the house, at that moment, he was stopped and proceeding of search and seizure were proceeded. For the sake of argument, even if it is considered that the respondent was not trapped in a public place, even then he will not get any benefit, because the respondent was not trapped, searched and contraband article was also not seized from inside his house, therefore, provision of Section 42 of the Act will have no application in the instant case. Apart from this, Investigating Officer (P.W. 12) in compliance with Section 42 of the Act prepared the memorandum regarding secret information and assigned reason for not obtaining search warrant vide document Ex-hibit-P/3 and sent the intimation to this effect to Addl. S.P. Mandsaur, which was received by (P.W. 3) Karesingh, reader to Addl. S.P. Mandsaur, whose statement in this regard has already been discussed herein above.

14. The last question for determination is that Whether in absence of support by independent panch witnesses (P.W. 2) Prahlad and Mukesh (P.W. 5), the testimony of Investigating Officer (P.W. 12) and head constable (P.W. 8) Amrutlal can be relied upon or not'. This Court has gone through the statements given by both the witnesses and does not find any material contradiction between these witnesses regarding receipt of information from the informant, preparation of documents, apprehending of respondent in front of his house when he had come on his motorcycle and proceedings of search and seizure. The learned trial Court has discarded the testimony of Vijay Choudhari (P.W. 12) and Amrutlal (P.W. 8) only on the ground that both are police personnels and interested witnesses and could not be relied upon, though in paragraph 10, the learned trial Court has held that the statement of Investigating Officer (P.W. 12) is fully corroborated by the statement of Amrutlal (P.W. 8), police head constable. The law in this regard is well settled that testimony of official witnesses can be relied upon if they are found

to be trustworthy. In the case of *Khalek Sheikh v. West Bengal* : (2006)7SCC439 , the Supreme Court in paragraph 9 has observed as under:

9. The first issue relates to non-examination of independent witnesses. The Courts below analyzed in detail the factual position and came to hold as to why it was not possible for the prosecution to examine any independent witness. There is no prohibition on a conviction being recorded on the basis of the testimony of official witnesses if they are found to be trustworthy.

15. In the case of *Khalek Sheikh* (supra) there was non-examination of independent witnesses in Court, whereas in the instant case, independent witnesses were examined and they turned hostile though admitted their signatures on the relevant documents. (P.W. 2) Prahlad, Panch witness has admitted that he was not threatened by the police for signing on the documents. (P.W. 4) Manohar Soni also denied the proceeding, but admitted his signature on the documents and stated that he had signed on the blank papers knowing well that signature should not be done on blank papers. He also admitted that he was not threatened by the police for signing on the blank papers. On going through the statement of both the panch witnesses, this Court is of the considered view that the panch witnesses, who went along with police party and admitted their signatures on all the documents, have deliberately turned hostile to the prosecution in support of the respondent.

16. Learned Counsel for the respondent placed the reliance on the case of *Bahadur Singh* 2002 Cri LJ 579 (supra), but in this case, Hon'ble Supreme Court did not place reliance on the testimony of investigating officer and head constable Gotiya (P.W. 3) because of serious material discrepancies in the evidence of recovery of seizure and those discrepancies are contrary to the statements between constable and investigating officer regarding search and seizure. The witness of the department (P.W. 4) constable is the person who was present at the time of search and seizure and stated that he reached on the spot, at that time (P.W. 3) Head constable had already taken search of the truck. The Hon'ble Supreme Court has also found serious infirmities regarding deposition of property in Malkhana. No such kind of serious infirmities or contradiction has pointed out by

the learned Counsel for the respondent in the instant case and also by learned trial Court in the impugned judgment. The learned trial Court, on the contrary has specifically held in paragraph 10 that statement of (P.W. 8) head constable Amrutlal is fully corroborating to the statement of investigating officer. The another judgment relied upon by the learned Counsel for the respondent is the case of Babu Chakraborty 2004 Cri LJ 4858 (supra). In this case, the breach of provision of Section 42 Sub-section (1) regarding search and seizure after sun set and before sun rise was noted and the house of the accused was searched in the night at about 21.55 hours attracting provision of Section 42 of the Act, therefore, this is also not helpful to the respondent.

17. In case of Ravindran alias John 2007 Cri LJ 3414 (supra) the Supreme Court has considered in detail the issue of non-examination of independent witnesses or hostility of independent witnesses and placing reliance only on the testimony of official witnesses while taking into consideration catena of earlier Supreme Court judgments held that 'Even where independent evidence is not examined during the course of the trial, the effect is that the evidence of the official witness may be approached with care and caution'.

18. In case of Ritesh Chakravarty v. State of M.P. 2007 SCC (Cri) Volume 1, 744, the prosecution case was discarded for search and seizure, which has taken place in a busy place, where persons were available for witnessing the search and seizure, whereas in the instant case, search and seizure had taken place at dead hour of night and evidence has specifically come in the statement of both witnesses that there was nobody available to call for witnessing search and seizure and proceeding was witnessed by above mentioned independent witnesses who were taken with raiding party.

19. In the case of Dilip v. State of M.P. 2007 (1) SCC (Cri) 377 : 2007 Cri LJ 880 the Supreme Court has observed in paragraph 15 as under:

Indisputably, however, effect of a search carried out in violation of the provisions of law would have a bearing on the credibility of the evidence of the official witnesses, which would of course be considered on the facts and circumstance of each case.

In the instant case, the secret information was received by the police between 12.00 a.m. to 1.00 a.m. in the night and immediately thereafter, the investigating officer called the panch witnesses and it has come in evidence that house of respondent was situated not far from the police station.

20. In the case of Jagdish v. State of M.P. : 2002(80)ECC3 , the Supreme Court in paragraph 4 has held that 'Our careful analysis of the deposition of (P.W. 1) Dudhnathrao shows that his testimony has suffered from many infirmities and it would not be safe to rely upon his sole testimony to hold the appellant guilty'. In paragraph 5, Supreme Court has pointed out serious infirmities that as to why (P.W. 1) Dudhnath had brought down only one passenger that was accused from the bus out of so many passengers, if he had no prior information regarding the accused or entertained any suspicion regarding the involvement of the appellant in smuggling of opium. Several infirmities have been pointed in this case and because of which whole testimony of (P.W. 1) police Official Dudhram has not been relied upon by the Supreme Court. In the instant case, facts and circumstances are entirely different. The investigating officer (P.W. 12) had received the information from the informant. He recorded the said information, thereafter called the panch witnesses and proceeded along with weighing measurement on the spot. It was a dead hour of night. His statement is fully corroborated by (P.W. 8) Amrutlal as also held by learned trial Court in paragraph 10. It would be apposite to mention here that in case of Nathu Singh 1974 Cri LJ 11 (supra), the Supreme Court has held that 'The prosecution case is fully supported by Mahadevsingh (P.W. 5) and Umashankar (P.W. 6) who are police officers, The mere fact that they are police officers was not enough to discard their evidence. No reason was shown for their hostility to the appellant'. So the law is well established that testimony of police officials can be relied upon for basing the conviction if the same stands trustworthy on careful and close scrutiny. We should also not lose sight of the present trend of hostility of the public witnesses towards prosecution case.

21. While appreciating the evidence on record and scrutiny, this Court was conscious that it is the appeal against acquittal and where two views are possible, the view taken by the Trial Court cannot be interfered, but in the instant case, the

trial Court has committed clear illegality regarding discarding FSL report Exhibit-P/34 and failed to assign sufficient reason on the basis of the evidence on record about infringement of provision of Section 42 of the Act. The trial Court has also committed error in holding that provision of Section 57 of the Act is mandatory whereas it is directory as discussed herein above and in the considered view of this Court, there is no infirmities and material contradiction in the statement of both the police witnesses. Their testimony is fully corroborated by FSL report and documents of search and seizure which were, without any delay, in compliance of provision of the Act, sent to superior official i.e. Addl. S.P. Mandsaur. The witness who had taken the documents is (P.W. 9), Ravi Shankar Dube and (P.W. 3) Karesingh, reader of Addl. S. P. Mandsaur had received the documents Exhibit-P/3, P/14 & P/15 and had also placed the same for perusal before Addl. S.P. Mandsaur.

22. Consequently, in view of the foregoing legal and factual discussion, this Court is of the view that the impugned judgment and finding of acquittal passed by the trial Court is not maintainable, therefore, same is set aside. The respondent is held guilty for commission of offence Under Section 8/18 of the Act. The learned Counsel is also heard on the question of sentence of the respondent for this offence. Minimum sentence is prescribed as ten years and therefore, respondent is sentenced to R.I. for ten years and fine of Rs. 1,00,000/- (Rs. One Lakh Only), in default of payment of fine, further R.I. for one year. The respondent is on bail. He is directed to surrender before the trial Court on 27th September, 2007 for undergoing the remainder part of sentence. On failure of appearance of the respondent on the given date, the trial Court is directed to take suitable legal action against the respondent and his surety, under intimation to this Court.