

**Rajesh Vs. the State**

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**Court :** Delhi

**Decided On :** Mar-16-1989

**Reported in :** 1989CriLJ1814; 1989(3)Crimes638; 1989RLR281

**Judge :** Santosh Duggal, J.

**Acts :** [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 100(4)

**Appeal No. :** Criminal Appeal No. 93 of 1987

**Appellant :** Rajesh

**Respondent :** The State

**Judgement :**

1. The appellant has come up in appeal, feeling aggrieved by his conviction for offence under S. 21 of the Narcotic Drugs & Psychotropic Substances Act, 1985 (in short the Act), by judgment dated 1st April, 1987, recorded by the Additional Sessions Judge, New Delhi, and order of sentence of 9th April, 1987 whereunder he was sentenced to R.I. for ten years with fine of Rs. 1,00,000/- sentence in default being R.I. for further two years.

2. The appeal was filed through Mr. M. S. Siddiqui, Advocate, but when it was taken up for hearing, he stated that after the appeal was filed, the papers were taken away by father of the appellant, and he has no instructions. The appellant on being produced from custody pleaded that he has no means to engage a counsel,

and made a request for being provided with a State counsel. It was considered expedient to appoint Shri M. S. Siddiqui, Advocate as amicus curiae, on account of his having filed the appeal, and thus being familiar with facts of the case. Accordingly Shri M. S. Siddiqui has argued the appeal as amicus curiae whereas Mrs. Usha Kumar appeared for the State.

3. Mr. Siddiqui assailed the findings of the learned trial Judge from a number of angles; the crux of arguments being that whole case of the prosecution was full of suspicion, on account of number of infirmities, and statutory lapses, apparent on the face of record. He pointed out that although the accused had been apprehended on the basis of alleged secret information, but no such record was kept nor any written report sent by the investigating officer to his immediate officer in charge, as required by sub-section (2) of S. 42 of the Act. He further argued that the evidence on record itself is dubious because of failure on the part of the investigating officer to associate any public witness, although there is evidence that they were available. He then contended that the provisions of the Act in regard to the sealing of the seized articles have been wholly violated, and that there is no reliable evidence to the effect that the seal of the SHO was in fact affixed on the sample, as well as parcels of the remaining substance, and that otherwise also, the investigating officer has gone by unwarranted assumption by straightway characterising the seized commodity as 'smack' without even mentioning the colour or condition thereof. He pointed out that invariably whenever such a substance is seized, case is taken to make a note in the seizure memo as well as in the rukka as to the colour of the substance, and that without the Chemical test conducted by the expert, the investigating officer had no reason to describe, the substance as to be 'smack' and that this speaks of the prejudicial manner in which the whole investigation was conducted.

4. Before taking up the contentions canvassed by Mr. Siddiqui for the appellant, and the reply arguments of Mrs. Usha Kumar, it is considered expedient to make brief resume of the facts of the case.

5. It is alleged that while SI Satpal Sharma (PW 6), then posted at P. S. Connaught Place, accompanied by constable Balwan Singh (PW 4) was on patrol

duty near Super Basar, he was met by SI S. N. Khan (PW 5), also of the same police station, who had with him constable Krishan Pal (not produced). When they reached Volga Restaurant, Connaught Place, a secret information was received by SI Satpal Sharma that one person was sitting in the Central Park smoking smack, and was also in possession thereof, whereupon he organized a raiding party consisting of the aforesaid police officials. Since the passersby, to whom request was made by SI Satpal Sharma for the purpose of raid, had declined to get associated; this police party proceeded towards Central Park, and allegedly found the appellant sitting on a bench on one side of the Central Park, and on the pointing out of the informer, apprehended him. The Sub-Inspector in charge of the raiding party, namely, Satpal Sharma informed the appellant that there was suspicion about his being in possession of smack and that in case he so desired, he can be taken to a gazetted officer for his personal search but this offer was declined by the appellant. SI Satpal Sharma further offered his personal search as well as search of other members of the police party but this offer too was also declined, whereupon the said SI Satpal Sharma took search of the accused and recovered one match box having sticks, one panni and one paper pipe from his hand, and also one pudia wrapped in piece of newspaper, and then in a polythene paper, was found from the right side pocket of his pant. The pudia allegedly contained smack, which on being weighed was found to be 4 gms.

6. Thereafter seizure was effected by SI Satpal Sharma, he separated one gm. by way of sample, and this sample as well as the remaining smack were made into separate parcels, sealed with the seal of SP S (Satpal Sharma). He prepared another parcel out of the remaining material, namely, match box, panni and paper pipe and sealed the same with his seal, and took them into possession by means of seizure memo Ex. PW 4/A.

7. He then prepared a rukka Ex. PW 2/A, and sent the same to police station Connaught Place for registration of a case, through constable Balwan Singh, making a request to the duty officer to inform the SHO of the police station Connaught Place about this seizure, asking him to reach the spot. It is stated that Inspector P. N. Arora (PW 1), who was then SHO police station Connaught Place, on being conveyed the message on wireless, reached the spot at about 10.05

p.m., and there he met SI Satpal Sharma and other police officers when accused Rajesh (appellant) was in their custody. SI Satpal Sharma also produced before him three parcels sealed under his seal and then the SHO affixed his own seal on those parcels and directed that the same be deposited with the Moharrir Malkhana and left the spot. In the meantime constable Balwan Singh returned with the copy of the FIR after the case had been registered on the basis of the rukka sent by SI Satpal Sharma, and rest of the proceedings such as personal search of the accused, and preparation of the search memo were completed, and accused as well as the exhibits were taken to police station. Seized samples were deposited by SI Satpal Sharma with the Moharrir Malkhana, head constable Ahte Sham Raza (PW 7).

8. The accused was sent up for trial and the learned Additional Sessions Judge after consideration of the evidence, and after rejecting the plea of the accused about false implication, recorded conviction and order of sentence as aforesaid. As already noticed, a number of pleas have been advanced on behalf of the appellant, which according to Mr. Siddiqui would vitiate the conviction. On going through the evidence, I am struck with the glaringly slipshod manner in which the entire investigation was conducted, making it necessary to take note of the lapses, on the part of the investigating officer, and utter failure on his part to pay due regard to various provisions of the Act, which have been incorporated by way of safeguards to ensure against false implication of innocent persons.

9. One cannot lose sight of the fact that the sentencing policy, as incorporated in this Act, is so stringent, and rightly so, because it is sought to be really deterrent, so as to curb the activities of drug users and peddlers who are proving as a menace to the health of the society, but in awareness of the heavy sentence or minimum of ten years' R.I. and fine of Rs. 1,00,000/-, the legislature introduced in-built safeguards in the Act so that the investigation is conducted in such a manner that there is no scope for any type of suspicion or doubt about the authenticity of the recovery.

10. The entire scheme contained in Chapter V of the Act is carved out with that end in view. Besides incorporating the provisions about the person to be searched

being aware of his rights such as being searched before a gazetted officer, and making provisions of the Code of Criminal Procedure in regard to arrest, search and seizure made under this Act applicable in specified cases, the Act lays down elaborate procedure as to how the seizing and apprehending officer is to proceed, after such a recovery. Sections 52 and 55 comprise part of the procedure, laying statutory guidelines, as to how the persons arrested, and articles seized; have to be handled. The relevant portions are extracted below. Sub-section (3) of S. 52 of the Act reads as under :

'(3) Every person arrested and article seized under sub-section (2) of S. 41, S. 42, S. 43 or Section 44 shall be forwarded without unnecessary delay to -

(a) the officer-in-charge of the nearest police station, or

(b) the officer empowered under section 53.'

11. This provision makes it obligatory on the arresting officer to immediately produce before the officer-in-charge of the police station, the person arrested as well as the article seized.

12. Section 55 provides thereafter that the said in charge of the police station :

'..... shall take charge of and keep in safe custody, pending the orders of the Magistrate, all articles seized under this Act within the local area of that police station and which may be delivered to him, and shall allow any officer who may accompany such articles to the police station or who may be deputed for the purpose, to affix his seal to such articles or to take samples of and from them and all samples so taken shall also be sealed with a seal of the officer-in-charge of the police station.'

13. A cumulative reading of these two provisions makes it clear that what is strictly required is that when any police officer, below the rank of the officer-in-charge of police station apprehends a person, suspected to be in possession of narcotic drug or other psychotropic substance he has to take charge of that person, detain him, conduct his search and in case such a person is found to be in possession of any drug or substance of prohibited category, then place him under arrest, but his

duty ends there. Next mandate of law is that he has to forthwith produce such a person, as well as the articles seized from him, before the officer-in-charge of the police station.

14. A bare reading of S. 55 makes it clear that it is the designated superior officer who is to take charge of the articles seized, keep them in safe custody, and may allow any person, who accompanies such seized articles to the police station, to affix his seal on the articles or samples thereof, but there necessarily has to be the seal of the officer-in-charge of the police station on such parcels.

15. The implication is that matters which can visit a person with such grave penal consequences, like R.I. for ten years and fine of Rs. 1,00,000/-, and further imprisonment in lieu thereof, as a matter of legislative police, ought to be handled by a senior officer, such as officer-in-charge of the police station. It is this officer who has to take charge of the seized commodity, have it sampled and sealed, and then get it deposited in the police station for safe custody pending orders of the Magistrate, and affix his seal on the parcels prepared out of the seized commodity, by way of samples as well as the residue, and it is only in the event of his permitting some junior officer to take those samples to the police station for depositing the same in the police station, that he can allow that officer also to affix his seal on those parcels.

16. Thus the only construction possible from a reading of S. 55 of the Act, in conjunction with S. 52(3), is that it is the officer-in-charge of the police station, namely, the SHO who is to take charge of the person arrested, as well as the articles seized, and supervise the proceedings, have the parcels sealed with his own seal, and then get them deposited at the police station for safe custody, either himself or through some officer, and in that event allow that other officer also to put his seal on the parcels already sealed with his seal.

17. A reading of the evidence in this case regrettably reveals that the investigating officer in this case went about in utter disregard of various provisions of the Act, and the SHO betrayed a very cursory, casual and mechanical approach, and did not bear in mind the responsibility placed upon him by the Act as officer-in-charge of the police station.

18. As already observed, on cumulatively taking note of the provisions of Sections 52(3) and 55 of the Act, the only action an investigating officer can take, awaiting arrival of the SHO, is to detain and search the suspect, and in case such a person is found to be in possession of any narcotic drug or psychotropic substance, then to place him under arrest. He has thereafter to inform the SHO, and produce the person arrested as well as the articles seized before him, and thereupon the SHO was to take charge of the whole proceedings. What happened in this case, on the contrary, was that the investigating officer even sealed the seized substance, by converting it into sample and other parcels and putting his own seal, long before the arrival of the SHO on the scene. All that the SHO did was, on his own showing, to spend about 10/15 minutes at the spot. He did not depose even about having interrogated the accused or assured himself that the recovery was in fact made, or as to what was the substance recovered. That had already been put into sealed parcels.

19. Even if his evidence were to be believed that he put his seals on the parcels, already sealed by the investigating officer, then also the procedure adopted was not what is enjoined by law. The object is that the SHO has to take charge of the seized articles including the prohibited substance, if any, have the parcels prepared under his own supervision, put his own seal and have them deposited in the police station. It is only when he is deputing some officer, subordinate to him, for the purpose of carrying the parcels to the police station for depositing in safe custody, then he is empowered to allow that officer also to put his seal. Here the proceedings had been carried out in reverse order inasmuch as the investigating officer, before arrival of the SHO, finished with every thing, including sealing of the parcels. This is certainly against the form as well as spirit of S. 55 of the Act. Even if the evidence, as led, is to be believed, then also the conclusion cannot be escaped that there has been utter failure on the part of the SHO to comply with the provisions of S. 55 of the Act.

20. I have another reason to hold contravention of this provision because I am not satisfied from the evidence that the SHO did, in fact, put his seal on the sealed parcels, and for the matter of that, he visited the spot. There is no record from the police station to show his departure for the scene of recovery, because it is stated

that he was already out on patrolling, and that he had received information on wireless, and had thereupon proceeded to the spot. Be that so, but the evidence that he put his seal on the sealed parcels is not borne out from the available documentary evidence i.e. entry, in the malkhana register. The malkhana moharrir has appeared in the witness box as PW 7 and as proved the relevant entry relating to this deposit, as PW 7/A. There is a categorical noting in this entry that the parcels carried the seals of 'SPS'. There is no mention whatsoever of there also bearing seal of 'PNA' which is seal of the SHO. The Explanationn offered by Mrs. Kumar, for this omission, is to the effect that the malkhana moharrir obviously copied from the seizure memo, and since the seizure memo had been prepared before the arrival of the SHO, and accordingly there could be no mention therein of his having put his seal on the sealed parcels, and thus the oral evidence of the SHO, as corroborated by investigating officer, and other SI S. N. Khan ought to be believed. She further stated that there is further corroboration to this, by evidence of expert, namely, PW 8 Shri V. S. Bisaria, Senior Scientific Officer-cum-Assistant Chemical Examiner to Government of India, Central Forensic Scientific laboratory, who deposed that the sealed parcels had seals of 'SPS' and 'PNA', when received in the office of CFSL.

21. I am afraid, it is not possible to give credit to the oral testimony, which is contradicted by documentary evidence in the form of entry in the malkhana register maintained at the police station. The malkhana moharrir, head constable Ahte Sham Raza unequivocally deposed that on 21st May, 1986 when he was working as malkhana moharrir, P.S. Connaught Place, SI Satpal Sharma deposited with him three parcels, with the seal of 'SPS', in respect of case FIR No. 394 dated 21st May, 1986 under S. 21 NDPS Act. He also deposed that he made entry in the malkhana register correctly as per condition of the sealed parcels. As against that, the oral testimony of the expert from the CFSL does not inspire confidence for the reason that in his report, there is no mention of particular of any seals. All that is stated in the report Ex. PW 6/8, is that CFSL received parcels with seal thereon, which tallied with the specimen seal.

22. Apart from the fact that the reference to the seal is in singular, and not in plural, which would have been the case had there been two distinct seals,

otherwise also, it is nowhere indicated that the seal was of SP S or PNA or both. Mr. V. S. Bisaria was examined in court on 21st March, 1987 i.e. almost after ten months of the receipt of the sealed parcels by him. In the absence of any noting in the relevant form or report, it is humanly impossible for him to have remembered the initial of the seal or seals affixed on those parcels. as against that, the entry from the malkhana register does not relate only to the factum of deposit by SI Satpal Sharma of the sealed parcels on 21st May, 1986 but also contains a note in the hand of the same malkhana moharrir, recorded on 27th May, 1986, and duly proved by him, which is to the effect that one sealed parcel of smack bearing seal of 'SPS' was being dispatched through constable Jaipal to the CFSL for examination. There is thus clear intrinsic evidence in this register, that on the date the sealed parcel was sent to the CFSL, it contained only one seal and that was of 'SPS' (Satpal Sharma). In face of this entry, the Explanationn offered by Mrs. Kumar as to the main entry of 21st May, 1986 being copy of the seizure memo, cannot carry any weight because on 27th May, 1986, the malkhana moharrir was obviously making a note on his own observation of the sealed parcel, and not by copying any document. No suggestion had been even put to this witness, namely, malkhana moharrir that he had made some omission in noting the number of seals while sending sealed parcel to CFSL, and that it contained seal of SHO ('PNA') also.

23. I, thereforee, find it to be a case where even the factum of SHO putting his own seal is rendered dubious, apart from the fact that it would have been inconsequential, even if he had done so, in view of the earlier finding that the provisions of S. 55 of the Act postulate entirely different requirements, to the effect that the SHO himself gets parcels prepared, and sealed, and puts his own seal in the first instance and invariably, and it is only incidental that when another officer is allowed to take the parcels to the police station, then he may also be allowed to put his seal in addition. It has been found as a fact that this procedure was given a total go by in this case, and that there was a clear contravention of the mandatory provisions of S. 55 of the Act, when the whole procedure has been subverted by the investigating officer, and he exceeded his authority as given to him by Sections 43 and 52(3) of the Act.

24. The aforesaid provisions have been incorporated with the manifest object that proceedings of recovery are handled and supervised by a senior officer, in matters such as falling under various provisions of this Act, punishment whereunder is fraught with grave consequences for an individual, the underlying idea being that the senior officers can be trusted to be fair in investigation, and not indulging in dubious practices.

25. When the prescribed procedure is abandoned, it gives rise to a gnawing suspicion that the officers at the junior level could have, for certain oblique reasons, roped an innocent individual, as in this case there is a consistent defense plea from the very start, by means of suggestion in cross-examination even to the SHO as PW 1, that the accused used to sit somewhere in the Connaught Place area, near the American Express building, selling cloth, and that on his failure to gratify the police officer concerned, he was implicated in this case. The accused tried to prove his defense by examining one witness also. That defense has no doubt been rejected by the trial court but the fact remains that the prosecution case must inspire full confidence before conviction can be recorded. These factors are lacking in the present case. The senior officer had not been associated in the sampling or sealing procedure, as mandated by law. Although the recovery had been allegedly effected at a public place, frequented by people, as admittedly there were a number of people in the Central Park, though at some distance, but no attempt was made to have even one person to witness the recovery. Although, I do not find it possible to subscribe to the view that provisions of S. 100(4) of the Criminal Procedure Code in term apply to cases under this Act, of personal search at public places, but nevertheless the fact that witnesses were available and were not associated, coupled with the situation that there was a blatant contravention of the provisions of S. 55 of the Act, does throw a doubt on the veracity or authenticity of the prosecution case.

26. For all the foregoing reasons, I find it to be a case where the conviction of the appellant in this case, for the offence under Section 21 of the Act is not sustainable I accordingly allow the appeal and set aside the judgment dated 1st April, 1987 and order of conviction dated 9th April, 1987.

27. The appellant is in custody. He is ordered to be set at liberty forthwith, if not required in any other case.

28. Appeal allowed.

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