

Dinesh Kumar Vs. State

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Court : Delhi

Decided On : Dec-15-1992

Reported in : 1993CriLJ898

Judge : Usha Mehra, J.

Appeal No. : Crl.A. 64/90

Appellant : Dinesh Kumar

Respondent : State

Advocate for Def. : Hridyjit Singh, Adv.

Advocate for Pet/Ap. : S.M. Shafir, Adv

Judgement :

1. Dinesh Kumar was prosecuted under S. 20, Part II and S. 21 of the Narcotic Drugs and Psychotropic Substances Act (hereinafter called as 'the Act'). He was tried, sentenced and convicted by the Additional Sessions Judge, New Delhi vide his order dated 27th February, 1990 thereby sentencing him to undergo R.I. for a period of 10 years and fine of Rs. 1,00,000/- in default of payment of fine further R.I. for a period of one year.

2. It is against the said conviction and sentence that the present appeal has been filed inter alias on the grounds that provisions of Ss. 42, 50 and 55 of the said Act

have not been complied with. That there were vital and material discrepancies in the statement of the witnesses which creates a doubt in the story set up by the prosecution and finally the alleged eye witness was a stock witness. This very Investigating Officer had used him as a witness in number of cases.

3. In order to appreciate the contention raised by the petitioner one must know the facts of the case. Briefly the facts of the case are that the Crime Branch of Delhi Police had received information that a person by the name of Dinesh Kumar, resident of District Bhind had been supplying Charas in South Delhi. This information on verification was found to be correct. therefore, on 15th January, 1988 at about 6 p.m. S.I. Om Prakash, I.O. of this case on receipt of secret information that Dinesh Kumar would supply Charas near Lal Sain Market, Ring Road, Lajpat Nagar organized a raiding party consisting of S.I. Harcharan Verma P.W. 1, Constable Brahma Nand P.W. 9 and Constable Dilip Kumar. It is further the case of the prosecution that this raiding party was constituted under the supervision of Inspector S. P. Singh. When this raiding party reached Lal Sain Market, S.I. Om Prakash requested 3-4 persons from the public to join the raiding party but they showed their inability. The Investigating Officer was ultimately able to persuade Shri Lakshmi Chand, P.W. 5 to join the raiding party. He agreed to do so. At about 8.15 p.m. Dinesh Kumar came to the D.T.C. bus stand situated near Lal Sain Market, Lajpat Nagar and on the pointing out of the informer he was apprehended. He was carrying a 'Thela' in his right hand. S.I. Om Prakash informed him about the secret information that he was having Charas and that his search was to be conducted. The accused was given a chance of being searched in the presence of a Gazetted Officer or a Magistrate but he declined the offer. Accused was offered to search the person of the raiding party but this offer was also declined by the accused. On Thela being searched and checked, it was found that it contained a wrapped polythene bag containing the charas which on weighment came to 2 k.g. and 500 grams. 50 grams of charas was separated as sample. It was sealed in a parcel and the parcel was sealed with the seal of S.I. Om Prakash. Remaining charas containing the polythene bag was put in a 'Thela' and was sealed in the parcel with the seal of S.I. Om Prakash. The entire case property including two parcels containing sample and charas and other containing 'Thela' and the newspaper etc. as well as the polythene bag containing charas

was taken into possession. CFSL form was filled up and the specimen of the seal O.P. was affixed on it. Ruqqa was sent along with two parcels and the CFSL form to the police station. Brahm Dutt produced two parcels before SHO Davinder Dutt Sharma who affixed his seal of D.D.S. on the parcel. Inspector Davinder Dutt Sharma deposited the parcels along with the CFSL form in the Malkhana of the Police Station.

4. On 28th January, 1988 sample parcel along with CFSL form were sent to the CFSL office. On receipt of the result of the analysis of the sample the accused was charged for the offences in question. He pleaded not guilty and claimed trial.

5. S.I. Harcharan Verma appeared as P.W. 1 Head Constable Rajinder Singh, P.W. 2, Abdul Wahid, P.W. 3 Constable Bram Singh P.W. 4, Lakshmi Chand, P.W. 5, N. I. Parshad P.W. 6, Inspector Davender Dutt P.W. 7 and S.I. Om Prakash P.W. 8 and Constable Brahma Nand appeared as P.W. 9.

6. Mr. S. M. Safir, Advocate appearing for the appellant contended that the alleged eye witness Lakshmi Chand (P.W. 5) was a stock witness for the prosecution. In fact in almost 3-4 cases, investigated by S.I. Om Prakash, Lakshmi Chand (P.W. 5) was shown as an independent witness. Lakshmi Chand is a resident of Laxmi Nagar whereas the incident took place at Lal Sain Market, Lajpat Nagar. It is not possible that this witness should always be available per chance whenever the case is investigated by S.I. Om Prakash. therefore, no reliance should be placed on the testimony of Lakshmi Chand who is a stock witness.

7. Lakshmi Chand appearing as P.W. 5 has admitted in his cross-examination that he knew S.I. Om Prakash the I.O. of this case for the last 1 1/2 years and that he appeared as a witness in 4-5 cases investigated by S.I. Om Prakash. He could not deny the suggestion that he appeared as a witness for the police in 25 cases and joined raiding party in almost the same number of cases nor he could deny his appearance as a witness for the police in cases bearing F.I.R. No. 216 under S. 20 of the N.D.P.S. Act, P.S. Mandir Marg, F.I.R. No. 16/88, under S. 20 N.D.P.S. Act P.S. Lajpat Nagar, F.I.R. No. 797/82 under S. 4/8 SIT Act P.S. Kalkaji, F.I.R. No. 46/88 under S. 20 of the NDPS Act (Crime) State v. Meemoratt, F.I.R. No. 14/88 under S. 4/8 SIT act P.S. Dabri, F.I.R. No. 812/87 under S. 20 N.D.P.S. Act

(Crime), F.I.R. No. 523/87 under S. 4/8 SIT Act P.S. Raitwas, F.I.R. No. 205/87 P.S. Jama Masjid, F.I.R. No. 15/88 P.S. Lajpat Nagar under S. 20 N.D.P.S. Act, State v. Gaffar. He could also not deny the fact that he appeared as a witness in the cases investigated by the S.I. Om Prakash. The I.O. SI Om Prakash who appeared as P.W. 8 has also admitted that he knew Lakhmi Chand the alleged independent witness prior to the incident. This fact he has not mentioned in any of the record nor in the case diary. He also admitted that Lakhmi Chand is a witness in few of the cases investigated by him and one case which he remembered bearing F.I.R. No. 523/87. The other cases he did not remember.

8. In view of the above position, I find force in the submission of the counsel for the petitioner that no reliance can be placed on the testimony of P.W. 5 Lakhmi Chand (P.W. 5) being not an independent and impartial witness, the question arises whether in the absence of an independent witness, can the appellant be convicted by placing reliance on the testimony of the police officials alone. It cannot be disputed that the police officials testimony cannot be disregarded or discredited merely on the ground that independent witness is not available. At the same time in the absence of independent witness the testimony of the police officials has to be scrutinised with caution. The law is well settled, if the Investigating Officer makes an honest effort to produce an independent witness but fails to procure one or when the independent person refuses to join the raiding party then in that eventuality the police officials testimony can be relied upon provided he strictly comply with the provision of law regarding search and seizure. In this case from the bear reading of the testimony of the Investigating Officer himself it is clear that he conducted the search and seizure in a very casual manner. He did not ask any shopkeeper or resident of that place to join the raiding party. It is an admitted fact on record that there were number of shops near the place of incident and across the road there are number of houses. But he did not bother to ask any shopkeeper to come and witness the seizure what to talk of associating them as witnesses. SI Om Prakash (P.W. 8) admitted that there were 5 to 7 persons standing at the bus stand when the accused was apprehended. But he did not ask any one of them to join or to witness the recovery. This is a clear pointer to the fact that the investigating officer did not make any effort to procure an independent witness. To this extent the trial Court went wrong in assuming that all efforts were made by the

I.O. to join independent witness nor can it be presumed that Lakshmi Chand (P.W. 5) was a chance witness. According to prosecution the raiding party reached the spot at 7.30 p.m. and exactly at that very time Lakshmi Chand after leaving his scooter at a distance came at the spot where the accused was to be apprehended. This cannot be a chance unless the Investigating Officer informed him from before to reach there and be a witness. The associating an independent witness from the public and their witnessing the search is not a mere formality. The provisions of the Act are very stringent, therefore the compliance of the same is all the more necessary. The nature of punishment provided for the offence under the Act is such that the legislature deliberately made certain provisions to afford safeguards so that innocent persons are not harassed. But if the Investigating Agency deliberately ignored to comply with the provision of the Act, the Court would have to approach their action with reservation and suspicion. The provisions of the Act are to be strictly complied with, the least which can be said in this case is that the Investigating Agency flouted the same with an oblique motive. Mere heavy recovery should not be the ground to come to the conclusion that whatever has been stated by the police officials is a gospel truth. Each case has to be weighed on its own merit and circumstances. Suspicious circumstances start when the Investigating Agency ignores to procure an independent witness though he could have procured the same. Instead he called a person, who was known to him from before, to associate as an independent witness. The matter does not rest there he even concealed this fact on the record. No mention of the same is made in the case diary nor this fact was known to the other members of the raiding party. On account of this suspicious circumstance which on the face of it will show that the testimony of police official cannot be easily relied upon.

9. In the background discussed above we have to weigh the evidence of the police officials. The accused has no way to prove his innocence or to show that false case has been foisted on him except by pointing out vital discrepancies in the police evidence. P. K. Bahri, J. in the case of Mohd. Shamin v. State, 1991 DC 82, observed that material aspects of the case are how the secret information was received and raiding party was formed, what efforts were made to join public witness and in what manner proceedings were carried out at the spot. Taking clue from the above decision what we see from the record in the present case is that

the testimony of one police witness does not tally with the other on any of the material aspect. There is a material contradiction in the testimony of S. I. Harcharan Verma (P.W. 1) and that of the Investigating Officer Om Prakash (P.W. 8) on association of the public witness. According to S.I. Harcharan Verma Om Prakash requested the passer-by as well as to shopkeepers to join the raiding party. But this fact is denied by S.I. Om Prakash himself when he stated that he did not associate or even asked the shopkeepers to join the raiding party nor made effort to ask the persons standing at the bus stand to witness the recovery or become witnesses. On the question of recording of the proceedings at the spot there is a material contradiction between the testimony of the Investigating Office S.I. Om Prakash P.W. 8 and that of Constable Brahma Nand P.W. 9 as well as of the alleged independent witness Lakhmi Chand P.W. 5. According to S.I. Om Prakash the proceedings were conducted at the foot-path while sitting on the ground whereas according to Lakhmi Chand the proceedings were recorded at the spot by bringing chairs and a table. These chairs according to Lakhmi Chand P.W. 5 were called by the police officials and the proceedings were recorded on the table. Besides this there are other discrepancies namely according to S.I. Om Prakash he did not ask persons standing at the bus stand to join witnesses whereas according to S.I. Harcharan Verma and Brahma Nand, S.I. Om Prakash asked all the passer-by as well as the shopkeepers to become witnesses. To my mind, this is a material contradiction. This shows either these officials were not present there or in order to cover up the case they are now deposing falsely. It is in such an eventuality the legislature has provided the corroboration by an independent witness of seizure and recovery. In the absence of an independent witness, as in this case, no much reliance can be placed on the testimony of these police officials particularly when they are contradicting each other on material points. It appears that the police party which raided the accused dealt this case in a very casual manner. They did not bother to comply with the provisions of various Sections of the Act. On this ground itself the conviction of the appellant for the offence and the sentence awarded there under is liable to be set aside.

10. In the consequences appeal is allowed. The order of conviction and sentence punishable under S. 20, Part II and S. 21 of the N.D.P.S. Act, 1985 is set aside. The appellant shall be released forthwith if not required in any other case.

11. Appeal allowed.

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