

Prem Singh Vs. State

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Court : Delhi

Decided On : Mar-20-1996

Reported in : 1996CriLJ3604

Judge : Usha Mehra, J.

Acts : Narcotic Drugs and Psychotropic Substances Act - Sections 50

Appeal No. : Cri.A. No. 166 of 1992

Appellant : Prem Singh

Respondent : State

Advocate for Def. : Pawan Behl, Adv.

Advocate for Pet/Ap. : Mukesh Kalia, amices Curia

Judgement :

1. Prem Singh, petitioner herein was apprehended on 6th March, 1990 by the Investigating Officer, S.I. Durga Prasad of Police Station Town Hall. Prosecution case is based on secret information received by S.I. Durga Prasad informing therein that a person sitting near Hardayal Municipal Chamber possessed smack. On receipt of this information, S.I. Durga Prasad arranged a raiding party consisting of Constables Ramesh Kumar and Raj Kumar and one Santosh Kumar a public independent witness. The secret informer pointed towards the appellant to

be that person. Pursuance of which appellant was apprehended. Before searching him option was given to be searched either before Gazetted Officer or the Magistrate, but appellant declined. Notice under S. 50 of the Narcotic Drugs and Psychotropic Substances Act (in short the 'Act') was served. S.H.O. in the meantime also came at the spot. It is the case of the prosecution that from the right side pocket of appellant's pant a match box 'Homelight' containing smack wrapped in a paper was recovered. On being weighed it turned out to be 4 gms. One gram was taken out as sample. The remaining was converted into Pullandas and duly sealed. Thus, the case property and the sample were sealed with the seal of DPJ and HLM. CFSL form was also filled. The seals after use were handed over to the public witness. Thereafter Pullanda, CFSL form and the sample were deposited with the Moharar Malkhana. Sample was sent to the office of the CFSL for analysis. On receipt of expert report Ex. P. W. 7/C the challan was filed. Prosecution examined as many as seven witnesses. After considering the facts which came on record the learned trial Court convicted the appellant and sentenced him to undergo rigorous imprisonment for 10 years and a fine of Rs. 1 lac, in default of payment of fine to further undergo simple imprisonment for one year.

2. The impugned judgment has been assailed by the appellant, primarily on the ground that there was no proof of deposit of Pullandas and sample with the Moharar Malkhana. The person who is alleged to have taken the sample with CFSL form to the office of the CFSL has not been examined. Hence in the absence of linking evidence the chances of tampering with the sample cannot be ruled out. Case property was neither produced nor proved. However, if the property as was produced is believed to be the case property then it must have been tampered with. In order to appreciate the contention of Mr. Mukesh Kalia, amicus Curiae we must have to evaluate the evidence properly. On 6th March, 1990 at about 5.15 p.m. when appellant was apprehended on search being conducted 4 gms. of smack on his person was found. The sample and the case property was sealed with the seals of DPJ and HLM, as per the SHO (P.W. 1). CFSL. Form was also filled. Notice Ex. P. W. 7/A under S. 50 of the Act was given. Seal after use was handed over to the said public witness. Seizure Memo has been proved as Ex. P.W.-1/A. Rukka also proved. It was sent to the Police Station

through Constable Ramesh Kumar. Site plan is Ex. P. W.-7/B. Personal search memo is Ex. P.W.-3/A. CFSL report is Ex. P. W.-7/C. Inspector Harbans Lal (P.W.

1) deposed that he kept the seal with him after affixing the same on the case property, on sample as well as on the CFSL form. So far as P.W. 2 ASI Satpal Singh is concerned, he could only prove that he made FIR Ex. P. W. 2/A, on the basis of the Rukka brought by Ramesh Kumar. There is clear contradiction in the testimony of P.W. 1 and P.W. 2 on the point of initials of the seal. Constable Raj Kumar (P.W.

3) testified that sample of smack and remaining smack was converted into two Pullandas and were sealed with the seals of DP and HLM. Whereas according to Inspector Harbans Lal (P.W. 1), the seal affixed were of DPJ and HLM. Similarly, Head Constable Mohd. Haroon (P.W. 4), Moharar Malkhana of the relevant time testified that 2 Pullandas were sealed with the seals of DP and HLM. These were deposited vide Serial No. 491 of the Property Register. He admitted that CFSL form was not deposited with the sample. Sample for analysis was given to Constable Ashok Kumar on 8th March, 1990 for depositing in the office of CFSL. Santosh Kumar public witness (P.W.

5) admitted that he was the SPO of the area. He knew the police party from before. He further admitted that the Investigating Officer did not request anybody to join the raiding party, though there was a large crowd near the place of the incident. Beside the crowd gathered, there were 'Rehriwala' and shopkeepers at a nearby place. But the I.O. did not try to contact them nor called them to become witness. Constable Ramesh Kumar (P.W.

6) stated that seals on the Pullanda and sample were affixed with the seals of DPJ and HLM. He further stated that except Santosh Kumar no one else was asked to join the raiding party. SI Durga Prasad Investigating Officer (P.W.

7) after giving details of the formalities completed after appellant was apprehended proved copy of the notice under S. 50 of the Act as Ex. P. W. 7/A. He stated that seals after use were handed over to public witness. Pullanda and CFSL form were seized vide Ex. P. W. 1/A. There were handed over to the SHO. He admitted that

no other person of the locality was asked to associate the raiding party. Investigating Officer took back the seals from the public witness when he met him by chance near Chandni Chowk.

3. As I have already discussed above, the attack is primarily on the ground of the missing link and avoiding to associate public witness. The alleged public witness Mr. Santosh Kumar was the S.P.O. of the area and hence cannot be called an independent witness. Further more, there are contradictions with regard to the seals used. Material witnesses have not been examined. From the testimony of Constable Raj Kumar (P.W. 3), it is clear that he was not aware what seals were used. He stated that seal with the seal of DP and HLM were used whereas actually seals with DPJ and HLM were used. This shows Constable Ram Kumar (P.W. 3) may not have witnessed the occurrence. Inspector Harbans Lal (P.W. 1) testified that the case property was sealed with the seal of DPJ and HLM whereas in Court when the case property was opened it had the seal of CFSL meaning thereby the sealed Pulanda which was opened in the Court having seals of CFSL could not be the same which was sealed with the seal of DPJ and HLM. If that be so, then what happened to the case property. It would not be wrong to assume that the case property was tampered with. Had it not been tampered then it would have the seals of DPJ and HLM. But that was not so. Hence Exs P. 1 and P. 2 cannot be called considered case property as the same were tampered with and resealed with another seal.

4. Now turning to the credibility of the statement of Santosh Kumar (P.W. 5), I am in agreement with the contention of Mr. Mukesh Kalia that he cannot be called an independent witness. Appearing as P.W. 5, he admitted that he knew the police party from before. He was the S.P.O. of the area. The Investigating Officer did not call any person standing at the place of the incident including Rehriwala and shopkeepers but picked up this S.P.O. of the area who was known to him from before and made him member of the raiding party. No Explanationn given why persons who had gathered there were not asked to join. This shows that no independent witness was associated. Santosh Kumar (P.W. 5) S.P.O. of the area was made to join in order to cover the lapse and challenge that public witness had not been associated. This was done in order to fill up the lacunae. By no stretch of

imagination (P.W. 5) can be called an independent witness. Admittedly, there can be cases where public witnesses are not available, for that the Explanation must be there. But in this case, no efforts were made to associate any public witness. It cannot be one of those cases where public witness could not be associated because of either on account of non-availability or refusing to join. I am touching the evidence of Santosh Kumar (P.W. 5) because he was stated to be a part of the raiding party. The Investigating Officer instead of handing over the seals to P.W. 5 stated that the seals were handed over to Shri Kishan Kumar. Who was Kishan Kumar, nothing has been brought on record. If seals were handed over to Kishan Kumar then how these were taken back from P.W. 5 after 5-6 days. The Investigating Officer (P.W. 7) has offered no Explanation for the same. The testimony of Investigating Officer that he handed over the seals after use to Kishan Kumar and took it back from P.W. 5 after four-five days by chance remained corroborated. therefore, no reliance can be placed to this part of the testimony of the Investigating Officer. On the contrary, Inspector Harbans Lal (P.W. 1) admitted that he kept his seal after use with him. This clearly contradicts the testimony of the Investigating Officer (P.W. 2). Moharrar Malkhana (P.W. 4) admitted that CFSL form was not deposited with him nor the same was sent to the office of the CFSL. Since, seals of P.W. 1 remained with him and handing over the seals to public witness having not been proved hence it cannot be ruled out that police had the opportunity to tamper with the case property and the sample as the seals were in their possession. Neither P.W. 1 nor the Investigating Officer deposited the CFSL form along with the sample in the Malkhana. Inspector Harbans Lal (P.W. 1) admitted that he only deposited the Pulanda with the Moharar Malkhana. He nowhere states that CFSL form was also deposited. This points to the fact that police could tamper with the sample. In the absence of CFSL form, the seals on sample could not be compared.

5. The incident is of 6th March, 1990. The sample was sent to the CFSL office on 8th March, 1990. The same was deposited in the office of the CFSL on 9th March, 1990 as per Ex. P. W.-7/C. The sample was taken and sent to the office of the CFSL through Constable Ashok Kumar. The said Constable Ashok Kumar has not been adduced. He was given the sample for deposit in the CFSL office on 8th March, 1990. He kept it with him till 9th March, 1990. He deposited it as per Ex. P.

W.-7/C on 9th March, 1990. There was every chance for him to tamper with the sample. For his non-appearing in the witness-box, an adverse inference can be drawn. That sample so long remained in his custody was not tampered, there is no evidence in this regard. In the office of the CFSL only sample was deposited. It had no opportunity to compare the seals on the sample with the seals affixed on CFSL form and come to the conclusion that those were intact. In the absence of any Explanation as to why Constable Ashok Kumar kept the sample with him from 8th March to 9th March, 1990, presumption that the sample might have been tampered with cannot be ruled out. There are other material contradictions in the testimony of prosecution witnesses. As pointed out above P.W. 4 Moharar Malkhana says seals were of DP and HLM whereas as per Inspector Harbans Lal (P.W 1) and the Investigating Officer (P.W. 7) seals were of DPJ and HLM. P.W. 6 stated that seals of DPJ and HLM. The prosecution witnesses have given different seal initials. To my mind, this is a material contradiction. Why the seizure memo was not got signed from the accused, there is no Explanation. P.W. 6 stated that he did not bring back the FIR then how FIR number appears on seizure memo Ex. P. W.-1/A. There is no Explanation for the same. Even the circumstance that CFSL form with the sample was sent to the CFSL office was not put to the accused. Different versions have been given by the witnesses which show that things did not happen the way the prosecution wants this Court to believe. Why Constable Ashok Kumar through whom the sample was sent to the CFSL had not been produced. Material witnesses had been withheld allowing the doubt to creep in. There are material contradictions in the testimonies of witnesses with regard to handing over of the seals, filling up of the form, deposit of the case property and sample with Malkhana and joining of independent witness and of course of the use of the seals. For these reasons I am of the considered view that the appellant has been successful in creating a dent in the case of the prosecution. On the basis of the evidence which has come on record it cannot be ruled out that sample could not be tampered or the case property Exs. P. 1 and P. 2 were the same. Likelihood of the sample being tampered so long it remained in the custody of Ashok Kumar cannot also be ruled out.

6. For the reasons stated above, I am of the considered view that the impugned judgment of conviction and sentence cannot be sustained. The same are liable to

be set aside. Order accordingly.

7. But before parting, I want to put on record my appreciation for the hard work done by Mr. Mukesh Kalia. He was appointed as amicus Curiae in this case. He not only assailed the judgment on legal grounds but did a good job in pointing out various lacunae and material contradictions in the testimonies of the prosecution witnesses. He cited number of decisions on each of the points raised by him. I have not quoted all the authorities because I found that on the facts of this case, the impugned judgment cannot be sustained.

8. Order accordingly.

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