

Tilak Raj Vs. the State

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Court : Delhi

Decided On : Feb-22-1999

Reported in : 1999IIIAD(Delhi)362; 1999(49)DRJ18

Judge : J.B. Goel, J.

Acts : Narcotic Drugs & [Psychotropic Substances Act, 1985](#) - Sections 55 and 57

Appeal No. : CRL. A. No. 108/92

Appellant : Tilak Raj

Respondent : The State

Advocate for Def. : Ms. Mukta Gupta, Adv.

Advocate for Pet/Ap. : Ms. Neelam Grover, amices Curia

Judgement :

ORDER

J.B. Goel, J.

1. This appeal is directed against the judgment of conviction and order of sentence both dated 14th February, 1992 passed by the learned Addl. Sessions Judge (ASJ) whereby the appellant has been convicted for the offence under Section 21 of Narcotic Drugs & Psychotropic Substances Act (for short the 'NDPS Act') and

sentenced to RI for 10 years and a fine of Rs. one lakh and in default of payment of fine SI for 3 months.

2. Briefly, the facts are that the appellant was an undertrial (in case FIR No. 111/89 under Sections 380/411 IPC) and an inmate in Tihar Jail. On 10th July, 1989 when he was returned after a meeting/interview with his relations in the meeting room, he was searched by SI Ganesh Murthy TSP at about 11.30 a.m. and on his search two paper packets containing smack concealed in two green chillies were recovered in the presence of PW S.K. Matta, Assistant Superintendent of Jail. The accused was produced before Shri Sunil Gupta, Deputy Superintendent of Jail where the accused is al-legend to have confessed the aforesaid guilt/offence. Local police was informed and Shri Sunil Gupta lodged a written report to ASI Vijay Pal Singh who reached there. The recovered smack which weighed 500 mgms, purias and green chillies were seized by him in sealed parcels duly sealed with the seal of his colleague Jaswant Singh 'JS' (as his seal was not available with him). SHO Dilbagh Singh of PS Hari Nagar had also reached there and he had also affixed his seal of DBS on the sealed parcels; CFSL form was filled in and both the seals were affixed thereon also. An FIR was registered at P.S. Hari Nagar, CFSL report found positive test for heroin. The accused was challenged and charged for an offence under Section 21 of the NDPS Act.

3. During trial, prosecution, inter alia, examined Sunil Gupta, Deputy Superintendent (PW-3), S.K. Matta Asstt. Suptd. (PW-5), Inspector Dilbagh Singh SHO (PW-6) and ASI Vijay Pal Singh IO (PW-7) who supported the prosecution case. PW-1 HC Sujan Lal, Moharrar Malkhana, PW-2 Ct. Brahm Pal Singh had accompanied ASI Vijay Pal Singh, PW-4 ASI Jaswant Singh as Duty Officer had registered the FIR and PW-8 Ct. Jaipal Singh had taken the sample parcel to CFSL. In his statement the accused has taken the simple plea that it was a false case and the witnesses were false. He did not lead any evidence in defense.

4. The trial court believed the testimony of S.K. Matta as witness of recovery, Sunil Gupta Dy. Supdt. before whom confession was made and also other witnesses and convicted the appellant as aforesaid.

5. I have heard learned counsel for the parties. Learned counsel for the appellant has contended that SI Ganesh Murthy who had taken the search and was a material witness has not been examined and an adverse inference should have been drawn; and that the testimony of S.K. Matta and Sunil Gupta is not reliable and trustworthy and the conviction could not be based on their testimony. There are material contradictions in the testimony of the witnesses especially in the statements of SHO and IO; that provisions of Sections 55 and 57 of the NDPS Act have not been complied with; the two seals after sealing the parcels were not given to an independent witness but to a constable; the recovery memo has also not been attested by the SHO which shows that the SHO was not present at spot and in these circumstances the prosecution has failed to prove its case beyond doubt and the learned trial court was not justified in basing the conviction on the evidence and material available before it.

6. Learned counsel for the respondent on the other hand has contended that the non-examination of a witness will be fatal if there is no other reliable evidence and a witness is withheld unfairly or for oblique motive which is not the case here nor it is so shown; that though SI Ganesh Murthy was a witness of recovery but he has not been examined as he was not available; S.K. Matta is also a witness of recovery and in the circumstances non-examination of SI Ganesh Murthy is of no consequence; that the accused had made a confession before the Deputy Supdt. of Jail who is an independent officer and had no motive to falsely implicate the accused nor any ulterior motive is imputed to him. This also corroborates and is corroborated by the equally independent evidence of S.K. Matta (PW-5); she has also contended that Sections 55 and 57 are not mandatory and even otherwise they have been complied with and in any case it is not shown that any prejudice has been caused to the accused for that reason.

7. SI Ganesh Murthy of TSP was a witness of the recovery and so was a material witness. He was summoned 2/3 times but it was reported that he was member of 6th Battalion of TSP Tamil Nadu and that Battalion and the witness had since gone back to Tamil Nadu and so was not available.

8. In *Pal Singh & Others v. State of U.P.* , it was held that non-examination of some eye-witnesses by the prosecution would not necessarily give rise to adverse inference. In that case the High Court had believed the eye-witnesses Nos. 1 and 2 and had found their testimony absolutely credit-worthy and truthful and on the question of non-examination of some eye-witnesses it was held as under :-

'In such cases, the question which has to be determined is not whether the absence of the examination of the independent witnesses would vitiate the prosecution case by itself but whether the evidence actually produced is reliable or not. Once the Court gives a finding of fact that the evidence led by the prosecution is reliable and trustworthy, the infirmities arising out of non examination of witnesses will not be sufficient to put the prosecution out of Court. '

9. In the present case, the prosecution has examined PW-5 S.K. Matta, asstt. Superintendent of Jail as witness of recovery. He has deposed that he was on duty on 10.7.1989; at about 11.30 A.M., Ganesh Murthy, SI of TSP who was with accused Tilak Raj when the latter returned after interview with his relatives in the meeting room, had taken the search of the accused and had recovered two small purias of smack concealed in green chillies; that he and SI Ganesh Murthy had produced the accused along with the case property before Shri Sunil Gupta, Deputy Supdt. of Jail, the Police of Hari Nagar Police Station was informed and a police officer had reached there. He obviously had deposed as a witness of recovery. This position was got elicited in cross-examination, when he has stated that Ganesh Murthy was standing 2-3 feet away from him and the search was taken within his view. It was further suggested in his cross-examination that somebody else had put the smack in his chillies in order to take revenge and without his knowledge which he denied as incorrect. No suggestion has been put to him or to any other witnesses examined in the case that the accused was falsely implicated due to any enmity or hostility or otherwise. He is a public servant, was on duty and is an independent and a natural witness of the recovery. No infirmity has been pointed out during arguments to disbelieve him. The suggestion put to the witness also suggests that recovery of the smack was actually effected from him though according to him it was planted in him by someone. he was checked soon after he had interview with his relations. There

would not have been any occasion for anyone else for having planted the smack in the chillies available with him. Had it been so, that would have been within his special knowledge which he has not disclosed. Immediately after the search was effected, the accused was produced before Shri Sunil Gupta, Deputy Supdt. of Jail who had also lodged the FIR (Ex. PW-2/A). Sunil Gupta appeared as PW-3 and has deposed that on that day he was posted as Deputy Supdt., and the accused was produced before him with the case property recovered from him by SI Ganesh Murthy and S.K. Matta who had told him about the search and recovery of smack. He has further deposed that the accused had confessed before him that he was a smack addict and was taking the smack for his consumption, Police Station Hari Nagar was informed when ASI Vijay Pal Singh had reached there and he had made report Ex. PW-2/A to the said ASI. The smack was weighed and seized by ASI Vijay Pal Singh along with other articles in his presence. His report is the basis of FIR wherein this fact of confession is mentioned. To him also nothing has been suggested about any enmity or hostility or otherwise his deposing falsely. He is a senior public servant, was on duty and is an independent witness. These two witnesses have been believed by the Trial Court.

10. Illustration (g) to Section 114 of the Evidence Act provides that an adverse inference 'may' be drawn but it is not necessary that it 'must' be drawn. Obviously, whether an adverse inference is to be drawn or not is optional and it will depend upon the facts and circumstances of each case. It is not obligatory to draw such an inference in every case. Such an inference could be drawn where a material witness is deliberately withheld or unfairly kept back. In the present case, it had been reported that the witness was posted in 6th Battalion of TSP Tamil Nadu Force and that Battalion had gone back. Obviously the witness was not available and would not have been available within a reasonable time. It cannot be said that this witness has been deliberately withheld or the prosecution is influenced by some oblique motive.

11. PW-5 S.K. Matta has deposed as an eye witness to recovery. Testimony of Ganesh Murthy would have been duplication of his evidence. In the circumstances, non-examination of this witness would not militate against the prosecution case. Moreover, nothing has been shown that the said unexamined

witness had contrary evidence to say. In the circumstances, learned Trial Court was justified in not drawing adverse inference for non-examination of SI Ganesh Murthy. Nothing has been elicited in cross-examination of PW-5 S.K. Matta nor anything has been suggested in his own statement made by the accused under Section 313 Cr.P.C. why the appellant would have been falsely implicated.

12. Extra judicial confession, if voluntarily made, can be relied upon along with other evidence in convicting the accused. In the present case, as already noticed, PW-3 Sunil Gupta, Deputy Supdt. of Jail has deposed that the accused when produced before him with the alleged recovery of smack had confessed before him that he was a smack addict and he was taking smack inside the jail for his consumption. In the report Ex. PW-2/A lodged by him also it is so mentioned.

13. As already noticed testimony of PW-3 about the confession made by the accused is reliable, trustworthy and the confession is also clear and voluntarily made. Conviction could safely be founded on this confession itself. In this case it is substantiated by the testimony of WP-5, S.K. Matta. The learned Trial Court has believed it. Nothing has been shown to take a different view on it.

14. Learned counsel for the appellant has then contended that the smack recovered was not taken into possession by the SHO and as such Section 55 of the NDPS Act has not been complied with.

15. Section 55 of the Act provides that an officer in charge of Police Station shall take charge and keep in safe custody all articles seized under this Act within the local jurisdiction of that police station and which may be delivered to him. PW-7 Vijay Pal Singh (IO) has deposed that he was the IO and had seized the smack and other articles recovered after sealing with the seal of 'JS' and in the meantime SHO had also reached there and he was apprised of the facts and the S.H.O. had also put his own seal of DBS on the seized articles. He has further deposed that thereafter he had deposited the case property in the Malkhana of the police station in the presence of the SHO though the SHO had not accompanied to the Malkhana. Obviously, the case property was deposited in malkhana by the IO under the control and supervision of the SHO. In the circumstances, it cannot be said that Section 55 has not been complied with.

16. Learned counsel for the appellant has also contended that Section 57 of the Act has also not been complied as report was not sent to higher officers. In this case, smack was not recovered in the presence of the local police, the IO. ASI Vijay Pal Singh had arrested and seized the contraband and the SHO had also reached at the spot. SHO is the immediate officer superior to the ASI. This provision has also been complied with. In any case, the provision is not mandatory and would not vitiate the prosecution case, especially when the evidence of recovery has been found to be reliable and trustworthy and it is not shown that any prejudice has been caused to the accused.

17. It is also contended that the SHO PW-6 has not identified the accused in the dock. It was not the SHO who had arrested the accused nor he had acted as an IO. His statement was also recorded after a gap of over 2-1/2 years. Non-identification by him is of no consequence and moreover the identity of the accused is not disputed.

18. It was also contended that PW-6 SHO had not signed the recovery memo. Learned counsel has not shown that the recovery memo was necessarily required to be signed by the SHO. Recovery memo is Ex. PW-2/B. It has been witnessed by two persons, one Ct. Brahm Pal and other by Shri Sunil Gupta, Dy. Supdt. of Jail. SHO was not a witness of actual recovery. Non-attesting by the SHO of the seizure memo is also of no consequence.

19. It was also contended that the seals used by the IO and the SHO were not given to an independent witness. SHO Dilbagh Singh PW-6 and ASI Vijay Pal Singh PW-7 have deposed that the seal after use was handed over to Ct. Brahm Pal PW-2 who has also so deposed, ASI Vijay Pal Singh has deposed that the case property was seized by him, it was sealed by two seals of 'JS' and 'DBS' and he had deposited the same in the Malkhana duly so sealed. PW-1 HC Shugan Lal who was Moharar Malkhana has deposed that the case property was deposited with him on 10.7.1989 duly sealed with the seals of 'JS' and 'DBS' and on 23.8.1989 he had sent the sample uplands to CFSL in intact condition. Ex. PW-7/B is the CFSL report which also shows that the parcel examined was intact and sealed with the seals of 'JS' and 'DBS'. It is thus proved that the seals remained

intact. This contention also has no force.

20. For all these reasons, I do not find any illegality or infirmity in the judgment of conviction. The same is based on material on record, is reasonable and justified. Order of sentence is also not unreasonable. Hence no interference is called for.

21. In the result, there is no merit in this appeal. The same is hereby dismissed. The appellant be informed through Supdt. of Jail.

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