

Mohd. Hussaln Vs. State

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Court : Delhi

Decided On : Mar-15-1989

Reported in : 1989(3)Crimes679; 38(1989)DLT217

Judge : P.K. Bahri, J.

Acts : [Narcotic Drugs and Psychotropic Substances Act, 1985](#) - Sections 18;
[Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 293

Appeal No. : Criminal Appeal No. 3 of 1988

Appellant : Mohd. Hussain

Respondent : State

Advocate for Pet/Ap. : Shyam Moorjani and; K.K. Bakshi, Advs

Judgement :

P.K. Bahri, J.

(1) This appeal has been brought against judgment dated October 21, 1987. and subsequent order dated October 26, 1987, of an Additional Sessions Judge, by which he had convicted the appellant of offence punishable under Section 18 of the [Narcotic Drugs and Psychotropic Substances Act, 1985](#) (for short 'NDPS Act') and had sentenced him to undergo rigorous imprisonment for 10 years and to pay a fine of Rs. 1,00,000.00 (one lakh) and in default, to undergo further rigorous

imprisonment for six months.

(2) On receiving a secret information at the Police Station itself which was reduced into writing in daily diary at Seriall No. 7A at li 05 AM' with regard to a person carrying opium, the police party comprising of Daryao Singh, Sho then posted at Police Station Sadar Bazar, Si 0m Parkash (Public Witness 4) and Constables Suresh Chand & patch Singh proceeded to the crossing of Qutab Road where public witness Ram Gopal (Public Witness I) met and joined and on the pointing out of the secret informer at about 11.30 A.M. the appellant was apprehended and was found to be carrying an attachecase on his right shoulder and another attachecase in his left hand and after the appellant was given a choice of having his search being carried out in presence of a gazetted officer and on its being declined the attache- case, which was on the right shoulder of the appellant, was got opened with the key supplied by the appellant and it was found to contain nine packets containing opium. From each packet 50 grams of opium was taken as sample and all the nine samples were sealed, so also the remaining opium in nine packets. The total weight of the opium came to be 21kgs. Both the Investigating Officer and the S.H.O. had put their seals. The recovery memo Ex. Public Witness I/A was prepared in that respect while in respect of the clothes and some money recovered from the other attachecase and person of the appellant, recovery memo Ex. PWI/B was prepared. Both the recovery memos were signed by Ram Gopal, Inspector Daryao Singh and Constable Patch Singh, Rukka Ex. PW4/A was prepared on the basis of which the case against the appellant as per Fir, copy Ex. PW6/A, was registered. The case property was deposited in Malkhana and these nine samples were taken by Constable Ram Kumar (Public Witness 3) from Malkhana on September 11, 1986 and deposited at the Central Forensic Science Laboratory and the Cfsi report Ex. PW4/D was received showing that the contents of the samples gave positive test for opium and the percentage of morphine in respect of each sample was also noted down in the report.

(3) The prosecution case was sought to be proved from the statements of Pwi Ram Gopal, PW4 Si 0m Parkash and PW5 Inspector Daryao Singh whereas PW2 is Moharir Malkhana who proved entries from the Malkhana register, of which copy is Ex. PW2/A. PW6 was the Duty Officer, who had recorded the Fir of this case.

(4) The first contention raised by the learned counsel for the appellant, who was appointed amicus Curiae at State expense on the request of the appellant, is that the public witness, who has been joined, is a stock witness of the police and if not the stock witness, was a witness who was under the influence of the police, hence, no credence should be given to his testimony. Pwi Ram Gopal has stated that he was having the business of binding of books at a regular shop located in Ram Nagar in the area of Police Station Nabi Karim. He admitted frankly that he knew Inspector Daryao Singh and Si Om Parkash even earlier as he had been coming to the Police Station occasionally but he stated that except for one police case of kidnapping he had never appeared in any other case as a witness. The Investigating Officer had explained that this Ram Gopal has been rendering some assistance in civil defense and the office of civil defense is located within the precincts of the Police Station. It is on account of this witness participating in some work in connection with civil defense that he had perhaps become familiar with the said police officials but that alone would not be sufficient to discard the testimony of this witness. Obviously he is not a stock witness of the police inasmuch as it is not shown that he had been appearing as a witness for police now and then. It has been then argued that no efforts have been made by the police to join any other public witness although there were shops present near about the place of occurrence besides a Tonga Stand. The Investigating Officer had stated in cross-examination in this respect that there was paucity of time as such no effort could be made to join any other public witness. It should not be forgotten that the secret information was received by the police at the Police Station at 11.05 A.M. and the appellant was apprehended at Qutab Road Chowk at about 18.30 A.M. So, the police must have been anxious to apprehend the appellant without creating any commotion at the spot in making requests to other public persons to join in the raiding party and that would have perhaps resulted in making the appellant apprehensive which might have resulted in failure of the raid with the appellant disappearing from the scene. It is true that normally whenever any recovery is to be effected by the police, the police should join public witnesses to ensure that the investigation being done by the police is fair, but it cannot be laid down as a broad proposition of law that if two public witnesses are not joined for any reason whatsoever the recovery effected by the police should be held to be doubtful. It

would depend on the peculiar facts of each case in order to decide whether failure of the police to join public witness was on account of some good reason and if that is so, the recovery effected by the police cannot be on that score alone held to be doubtful.

(5) So, keeping in view the facts appearing in this case and particularly when a public witness Ram Gopal had been joined, I come to the conclusion that failure of the prosecution to request any other public witness to join in the proceedings does not shatter the case of the prosecution. It is pertinent to mention that the appellant in his statement under Section 313 of the Code of Criminal Procedure, came up with the plea that this huge quantity of opium, in fact, had been recovered from the toilet of a train and he along with 2-3 persons including Dwi Suresh Kumar were taken to the Police Station while all others were let off and this recovery was falsely foisted on the appellant. It is significant to mention that this story was not put to Pwi in cross-examination at all who was examined as a witness on May 11, 1987. This story came to be put forward for the first time only to the Investigating Officer who came to be examined on August 24, 1988. So, on the face of it this defense version which had appeared belatedly in the trial is an afterthought version and cannot be believed, and the Additional Sessions Judge was right in discarding the defense version and also the testimony of Dwi Suresh Kumar who admittedly comes from the same place as the appellant.

(6) The learned counsel for the appellant has then pointed out-that although it has been stated by the witnesses that seals of Sho and also of Investigating Officer stood affixed on the case property as well as the samples yet the seal of the Sho was not handed over to any other person and the Sho continued to retain the said seal and thus, a suspicion arises regarding the case property having been substituted at some stage or the other. I do not agree. After all there were two seals affixed on the case property and one of the seals was of the Investigating Officer and was handed over to the public witness. Hence, there was sufficient assurance appearing on the record that the case property could not have been tampered with by the mere fact that seal of the Sho remained with the SHO. It is also significant to mention that the statement of Moharir Malkhana that as long as the case property remained in Malkhana the same remained intact, remained

unchallenged. He was not at all cross-examined. It was argued that in his statement he did not mention the particulars of the seals affixed on the case property but the learned counsel for the appellant forgets that he had made entries in Malkhana register contemporaneously at the time the case property was deposited and the entries of Malkhana register show that particulars of the two seals, which stood affixed on the case property, stand enumerated. So, there is no force in this contention of the learned counsel for the appellant in this respect.

(7) The learned counsel for the appellant has then argued that in absence of examination of the expert witness who had given report Ex. Pd it cannot be held that the contents of that report Ex. Pd are sufficient to show that the samples of this case with its seals intact had been received at the office of the CFSL. In the report Ex. Pd it has been clearly mentioned that nine sealed samples with seal intact as per official specimen enclosed had been received. It has been stated by the Investigating Officer in his testimony that the CfsI form was duly filled in at the spot and the specimen of both the seals were affixed on that form. The contents of the CfsI report have to be taken as correct in view of the provisions of Section 293 of the Code of Criminal Procedure A similar point came up for consideration by this Court in the case of Richhpal v. State (Delhi Admn.) 1988 (2) DI 422 and it was laid down that all the contents of the CfsI report have to be treated as correct and in case defense wanted to challenge the said report, the defense should have prayed to the trial court for calling the expert with the record for the purposes of cross-examination to enable the defense to prove that the contents of CfsI report are in any manner incorrect. It has been then argued that when the case property was brought in Court during examination of Pwi, the same was opened under the orders of the court but the court did not record in the proceedings that it had seen the seals of the case property and they were intact. I do not think that defense can take any advantage of omission of the court to record such a fact in the proceedings. After all if the case property did not have the proper seals affixed on it, the defense could have easily brought to the notice of the court that the case property was not having proper seals and so this fact should be noted down. Normally every court before opening the case property examines the case property in order to see that the seals on the case property are intact. It is not possible to believe that in this case the Court would not have followed the normal

procedure. It has been then argued by the learned counsel for the appellant that the key of the attachecase was not put in a separate sealed parcel. I do not understand how this particular fact could go to show that the prosecution version with regard to the recovery of the said opium from the appellant is in any manner shakened.

(8) The learned Additional Sessions Judge bad in his judgment considered all the aspects of the case and had thoroughly scrutinised the statements of the witnesses and had held that the prosecution case stands proved beyond any shadow of reasonable doubt. I entirely agree with the findings of the Additional Sessions Judge in this connection. It is to be remembered that nothing has been brought on the record to show that police had any reason to falsely implicate the appellant in this case. Huge recovery of opium had been effected from the appellant and the statements of the police officials in the present case inspire confidence regarding their truthfulness, particularly when they stand duly corroborated by the testimony of an independent public witness PWI.

(9) I, hence, find no merit in this appeal. I affirm the conviction and sentences of the appellant and dismiss the appeal.

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