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Nathu Ram Vs. State

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Court : Delhi

Decided On : Jun-14-1989

Reported in : 1990CriLJ806; 39(1989)DLT103; 1989(17)DRJ249; 1989(24)ECC139

Judge : R.L. Gupta, J.

Acts : Narcotic Drugs and Psychotropic Substances Act, 1985 - Sections 42

Appeal No. : Criminal Appeal No. 22 of 1989

Appellant : Nathu Ram

Respondent : State

Advocate for Pet/Ap. : D.C. Mathur,; Neelam Grover and; I.U. Khan, Advs

Judgement :

R.L. Gupta, J.

(1) This appeal is directed against the conviction and sentence dated 27.1.1989 by which Mr R.C. Jain, Additional Sessions Judge, Delhi, convicted the appellant under Section 20 of the Narcotics Drugs and Psychotropic Substances Act, 1985 (hereinafter called 'the Act') and sentenced him to under go rigorous imprisonment for a period of 10 years and also to a fine of Rs. 1 lac or in default suffer a further a simple imprisonment for 2 1/2 years.

(2) The story of the prosecution is that the Vigilance Department of Delhi Police, New Delhi, had information that one person by the name of Nathu receives charas from one Baldev Singh @ Abdul Latif and sells the same to different persons and that on 13.8.1986 he will come on his scooter No. DIS-3029 and hand over the same to some party in Hotel Basant. On the basis of this information they organized a raiding party comprising of Sub-Inspectors Bir Singh and Surender Pal Rana. Head Constables Dharam Singh, Constables Rajinder Singh, Basi Haider Paramanand and Ajay Kumar under the supervision of Inspector Jai Pal Singh in the office of Dpc (Vigilance). The raiding party started from the police headquarters at about 1.50 Pm in a Government Vehicle No. Ded 532 toward Basant Hotel, Pahar Ganj and picketed 'Nakabandi' near the Tonga Stand, Basant Hotel in a gali adjoining Basant Hotel. A public witness Mr. Abdul Rauf, a waiter-cum-receptionist in Hotel Basant was also joined. The raiding party waited for the arrival of Nathu. At about 2.05 Pm, one person whose name and address was later on found as Nathu Ram son of Desh Raj, resident of House No. 7802, Katra Jamaluddin, Arakashan Road. Ram Nagar, Paharganj, New Delhi, arrived there on scooter No. DIS-3029 and as soon as he parked his scooter near Basant Hotel, at the pointing out of the informer, he was overpowered. He was than informed that if he desired, his search could be taken in the presence of some gazetted officer or a Magistrate. But he (the appellant) declined. Then in the presence of ?he raiding party and .public witness Abdul Rauf the dicky of the scooter was got opened from the appellant. It was found to contain four packets of charas in the from of slabs, wrapped in polythene paper. Each packet was further tried with a thread. Those four packets were separately weighed and were found to be of one Kg each thereforee, the total weight of the four packets was found to be 4 Kgs. They were numbered A to D. 10 grams each was separated as sample from each of the four packets. The samples were put in paper envelopes separately and converted and into four separate parcels Ad the four packets of charas were converted into one parcel and sealed with the seal impression 'JPS'. The sample parcels were given Seriall numbers I to 4 and were separately sealed with the same seal impression 'JPS'. From Cfsl was also filled at the slop Specimen of the seal impression was also prepated. On checking of the scooter the papers concerning the scooter were, not found. The sample parcels, the one parcel of the remaining charas, the

keys of the scooter along with the scooter were taken into policy procession vide the seizure memo. The Rukka Ex Public Witness 5/A was forwarded of police station, PaharGanj through Constable Basi Haider for registration of a case. The personal search memo of the appellant Ex Public Witness 1/B was also prepared at the spot. The investigation of this case was carried out by Inspector Jai Pal Singh, Public Witness-12 who prepared the site plan Ex Public Witness 12/A. The appellant had refused to be searched before a Magistrate and he gave in his own handwriting the paper Ex Public Witness 2/8 to that effect. The Appellant further made a disclosure statement on the basis of which a raid was organized and 5 Kgs of charas was recovered from Baldev @ Abdul Latif staying in Micki restaurant on the same evening. After completion of investigation the charge sheet was filed and the appellant was tried, convicted and sentence as stated above. It may also be noted that the co-accused Baldev alias Abdul Latif was prosecuted separately. He was also prosecuted in this case along with the appellant under Section 29 of the Act. He was, however, discharged by the learned trial court vide order dated 4.9.87. The sample parcels were also allegedly sent to Cfsl, whereupon the report Ex. Public Witness 12/C was received from. the Cfsl staling that the samples gave positive test for charas.

(3) I have beard agruments advanced by learned counsel for the parties and have given my careful consideration to the evidence examined and have also carefully pursued the judgment recorded by the learned trial Judge. Learned counsel for the appellant brought to my notice that the police failed to comply with certain mandatory provisions of the Act, and on this account the appellant deserves to be acquitted. My attention has been draw to Section 42(1) of the Act. It is provided in this Section that when any officer being an Officer superior in rank to a peon, sepoy or constable of the departments of central excise, narcotics, customs, revenue intelligence or any other department of the Central Government or of the Border Security Force as is empowered in this behalf by the general or special order by the Central Government or any such officer of the revenue, drugs control, excise, police or any other department of a State Government as is empowered in this behall' be general or special order of the State Government, if he has reason to believe from personal knowledge or information given by any person ami taken down in writing that any narcotic durg, or psychotropic substance in respect of

which an offence punishable under Chapter Iv has been committed then only he has the power to enter into and search any such building, conveyance or place. Upon the basis of the words, 'and taken down in writing' it is argued that it is incumbent upon a police officer to take down in writing any information which is supplied to him about the commission of an offence under this Act. Since secret information received by an officer of the Vigilance branch was nut reduced to writing and not forwarded to any immediate superior officer as enjoined by Section. 42(2) of the Act. the whole proceedings being in violation of Section 42 were vitiated. I do not agree with this contention of the learned counsel for the appellant. It has been rightly pointed out by learned counsel for the State that it was not obligatory for the officer to record any such information in writing. Sub-section (2) of Section 42 of the Act states as follow : 'Where an officer takes down any information in writing under Sub-section (1) or records grounds for his belief under the proviso thereto, he shall forthwith send a copy thereof to his immediate official superior'. It clearly shows that the information can be forwarded to the immediate superior officer only where such information is taken down in writing. thereforee, by necessary implication, if such an information has not been recorded by the officer, question of sending any such information to any superior officer does not arise. thereforee, the requirement under Section 42 of the Act for reducing the information in writing can be said to be only directory and not mandatory.

(4) It was then contended that the grounds of arrest were not furnished to the appellant at the time of his arrest and, thereforee, was non-compliance of Section 521) of the Act. In this respect we have the statement of Inspector Jai Singh, Public Witness-12 that at the time of the apprehension of the appellant on the pointing out or the secret informer, be disclosed to him his own identity and also the contents of the secret information. As already pointed out above, the secret information was that the appellant was dealing in charas. thereforee, .when the contents of the secret information were disclosed to him then coupled with the arrest of the appellant at that time will clearly amount to disclosing to him the grounds of arrest.

It is then contended to that there was non-compliance also of the mandatory provisions of Sections 55 of the Act because sampling had to be done in the presence of the Officer-in-charge of the Police station. Section 55 of the Act lays down as follows : '55. Police to take charge of articles seized and delivered- An officer-in-charge of a 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.' The mandate of Section 55 of the Act is that the Officer-in-charge of the police station is compulsorily directed to allow that officer to affix his seal on such articles who brings the same to the police station. Officer-in-charge of the police station is also duty bound to allow such officer to take samples. So that such article or such samples are not later on tampered with, a duty is cast upon the Officer-in-charge of the police station to affix his own seal also. So even if, the case property and the samples extracted there from are sealed at the spot by such officer, the irregularity or the illegality stands immediately cured when the officer-in-charge affixes his own seal on such property either at the spot or in the police station. It is a matter of common knowledge that Officer-in-charge of a police station in Delhi are of the rank of Inspectors only. The raid was conducted in this case under the supervision of Inspector Jaipal Singh, Public Witness-9 who can be deemed to exercise the powers of an Officer-in-charge of the police station. All the sampling from the packets of charas was done in his presence and, thereforee, in my opinion there does not seem to be any violation of Section 55 of the Act in this case. Moreover, it may be noted that the case property as well as the samples taken there from duly sealed with the seal impression 'JPS' of Inspector Jaipal Singh were produced before Sh. Vijay Malik who was Sho i.e. Officer-in-charge of the Police Station, Paharganj. He appeared as Public Witness-11 in this case and deposed that at about 10 45 P.M. while he was present in his office in Police Station, Paharganj, Sub-Inspector, Jai Singh from Vigilance department came to him and produced before him one packet containing charas and four sample packets

ofcharas. They were affixed with the seal impression 'JPS' and he also affixed his own seal impression 'VM' on all those packets and ordered their deposit in the Malkhana.

(6) It is then argued that from the evidence on record, it appears that the seal impression of Sho, Vijay Malik was not affixed on the packet of the remaining charas as well as on the sample packets at the time of their deposit in the Malkhana. In this respect my attention has been drawn to the evidence of Public Witness-4, Sardar Singh, Head constable who was working as Moharar Malkhana in the Police Station on that date. He admitted in his cross-examination that the note in the register about, the presence of the seal impression of Sho was written in different ink later on while the details of the recovery memo were written at one time with the same ink. On this account, it is argued that at the time of the deposit to the case properly in the Malkhana, the seal impression 'VM' on the case property was not affixed and thereforee, it was doubtful whether the samples sent to Cfsl were drawn from the case ' property of this case or from some other case. I am not in agreement with this argument also. Public Witness-4 has given a very plausible Explanationn as to why this note regarding the seal impression 'VM' was made later on. He has stated that when he made the entries in the register, he had copied out the contents from the recovery memo and since there was no mention about the seal impression of the Sho in the recovery memo, so it could not incorporated. It may be noted that the seizure memo Ex, Public Witness 1/A was prepared at the spot. The seal impression 'VM' of SHO. Vijay Malik was affixed at the Police Station later on Naturally there could be no mention of the seal impression of the Sho in the recovery memo and thereforee, if by mistake the Moharrar Head Constable forgot to mention about its presence on the case property and that too during the late night hours could hardly make any difference. In my opinion given by the Moharrar Head Constable is most reasonable and appeals to roe.

(7) There are other reasons also for holding that the seal impression 'VM' had actually been affixed by Sho Vijay Malik when the case property was produced before him at the police station- Vijay Malik himself has appeared as Public Witness-11 and has deposed that at about 10.45 P.M When he was present in his

office in the Police Station Si Jai Singh from Vigilance department had produced before him one packet of charas and four sample packets of Charas which were already sealed with the seal impression 'JPS' and then he also affidived his own seal impression 'VM'. Then we have also the statement of Constable Gajender Pal Public Witness-8 who deposed that on 14.8.86 i.e. on ihe very next day of the seizure of the case property, he collected the four sample packets from Moharrar Malkhana of Police Station, Paharganj scaled with the seal impressions of 'JPS' and 'VM' and deposited the same at Cfsl office. So long as the property remained with him it was not tempered with. He farther deposed that the samples pertained to case Fir No. 575 of 1986. Admittedly this present case is based on this FIR. He was not at all cross-examination on behalf of the appellant, clearly implying that his statement was accepted as true by the appellant. thereforee, I am of the view that simply because the note regarding the presence, of the seal impression of Ihe Sho was incorporated a little later than the other entry in the register Malkhana, it does not make the case of the prosecution doubtful at all. Moreover, the case property was deposited in the Malkhana at about 11 P.M. on 13.8.86, and on the very next day, that is 14.8.86, almost within about 12 hours, it was sent to CFSL. thereforee, tampering with the sample packets was otherwise impossible.

(8) Learned counsel for the appellant then argued that the prosecution also failed to comply with the provisions of Section 57 of the Act, Section 57 of the Act contemplates that whenever any person makes any arrest or seizure under this Act, he shall, within 48 hours next after such arrest or sezure, make a full report of all particulars of such arrest or seizure to his immediate official superior. In my opinion, it cannot be said that there was non-compliance of the provisions of this Section by the prosecution. The investigation of this case was conducted by Si Jai Singh. Public Witness-12 and he brought the case property as well as the appellant at police Station, Paharganj before the officer-in-charge of the Police Station. The Fir, carbon copy of which is Ex. Public Witness 7/A was recorded at the Police Station at 2.50 P.M. on 16.8.86. Fir contains all the particulars about the appellant as well as the case property seized Copies of the Fir were forwarded to the area Magistrate as well as other Superior Police Officers. thereforee, I am of the view that the copies of the Fir being forwarded to various superior officers, it cannot be said that there was non-compliance with provisions of Section 57 of the

Act. In fact, the Fir contains full report of all the particulars of the arrest and seizure.

(9) It is then argued that there was also non-compliance of Section 80 of the Act, according to which the provisions of the Act are in addition to, and not in derogation of the Drugs and Cosmetics Act, 1940 or the rules made there under. On the basis of the above provision, it is argued that one such right available to the appellant under Section 23 of the Drugs & Cosmetics Act, 1940 was that the sampling should have been done as provided in Section 23 of that Act. It provides that the sample has to be divided into four portions and after sealing, one part of the sample has to be given to the accused so that he could get it tested from the Director, Central Drugs Laboratory, if he so desired. I am not in agreement with this argument also because the procedure of sampling is clearly provided in Section 55 of the Act itself. Moreover this point was also raised in case of Smt. Geeta v. Stale 1989 (1) D L 206 before my learned brother P.K. Bahri, J. wherein he ruled that the procedure of sampling laid down in Section 23 of the Druga & Cosmetics Act, 1940 cannot be followed while taking the sample under the present Act Learned counsel for the appellant argued that the above referred ruling was not correct. I do not agree with this contention., The difference between taking samples under the Drugs & Cosmetics Act, 1940 and the one under the present. Act is that the samples of medicine are taken under the previous Act from licensed chemists and druggists whereas the seizing of the Narcotic drugs under the present Act is from those persons who generally are traffickers in contraband articles. No such question arose from purchasing of Narcotic drugs from an unlicensed person. The purchase under the previous Act is resorted to by an Inspector because the persons dealing with drugs are licensed. Moreover, under Section 23 of the Drugs & Cosmetics Act, 1940 an Inspector is required to tender the fair price of the sample against a written acknowledgement from the accused. Since there is a complete ban upon dealing in such Narcotic Drugs and Psychotropic Substances imposed upon all persons except a licensed dealer or a licensed Chemist, which is not the case of the appellant, so there is no question of the offer of any fair price to such a person. If that be so, then the applicability of the procedure of sampling as envisaged by the Drugs & Cosmetics. Act, 1940 crumbles down. thereforee, I am of the view that the procedure of sampling as

envisaged under the Drugs & Cosmetics Act 1940 cannot be made applicable to the procedure of sampling under the present Act.

(10) My attention was then drawn to some minor alleged infirmities in the evidence of the prosecution. First of all it is argued that the only public witness joined by the prosecution Abdul Rauf Public Witness -2 did not identify if the appellant was the same person who was apprhended at the spot. To rebut this argument, I must refer the statement of this witness as to how far he goes in support of the prosecution case. In fact. he has completely corroborated the prosecution version up to the point of arrest. For instance he admits to have been joined as a witness by the police because they wanted to apprehend a person in possession of charas. He also corroborates that at the pointing out of an informer that person was arrested along with a scooter, that person was also asked whether he wanted to be searched in the presence of a Magistrate or a Gazetted Officer to which that person refused. He also admits that person prepared the memo of refusal in his own hand which is Ex Public Witness 2/B. He also admits that the case properly along with sample packets was taken into police possession vide Ex. Public Witness 1/A. He also slates that person himself at the asking of the police had opened the dicky of the scooter where from four packets of charas wrapped in polythene papers were recovered. They were further tied with threads which were Ex. P-10 to P-13 He further deposed that 10 grams each was separated as sample from each of the packets of the charas and these were sealed with seal Impression 'JPS'. thereforee, it will be seen that he has corroborated his entire prosecution version except the identity of the appellant. In that respect his statement may be noted in answer to the questions put to him by the learned trial court. Learned trial court put to him that he had deposed that he could not identify the person from whose scooter the charas was recovered. Then be also said that the accused present in court was not the same person. These above statements meant that the witness did have some idea about the particulars of that person in his brain on the basis of which he had said that the accused present in court was not the same person. thereforee, could the witness say as to on what basis he had said that appellant was not the same person? In reply to the above question the witness stated that he remembered only the complexion and height of that person. His complexion was wheat is and his height was about his own size. He gave his

own height as 5 feet and 9 inches and whereas according to him the complexion of the appellant present in court was fair and his height was more than his own height. Then another question was put to the witness that if that person from whose scooter the charas was recovered, was produced before him whether he could identify that person. In reply to that question he stated that since he did not remember the face of that person so even if that person was shown to him he could not recognise him. The above statement obviously shows that the witness so far as the identity of the appellant is concerned had been won over. Otherwise there is documentary evidence to establish that the appellant had been arrested in the presence of this very witness. Various documents were prepared at the spot which bear the signatures of the witness as well as those of the appellant. For instance Ex. Public Witness-1/B, the personal search memo of appellant. Ex. Public Witness-2/B, the refusal statement of the appellant for being searched in the presence of a gazetted officer or a Magistrate, the disclosure statement Ex. Public Witness-2/C of the appellant, all prepared at the spot bear the signatures of the witness as well as the appellant. The witness has admitted that all these documents were prepared at the spot. thereforee, the refusal of the witness to recognise the appellant is simply on account of the fact that in that respect he had been won over by the appellant. Another question which will come to a prudent mind is that unless the police had any enmity with the appellant, it is impossible to presume that he would be falsely implicated. There is no suggestion on behalf of the appellant to any of the witnesses including the police witnesses that any of them had any enmity with the appellant.

(11) The Explanationn of the appellant as to in what circumstances he was arrested is also very interesting, hi defense, it was put on his behalf to the witnesses that actually on that very day he had gone to the court of Sh. JR. Aryan, Metropolitan Magistrate along with the other accused Baldev Singh at about 10.00 A.M. and they were apprehended while standing out side the court of the learned Magistrate and after being detained in the police station till mid night they were falsely booked in this case. This Explanationn at least points out that the appellant was arrested on the very day on which the appellant is shown to have been arrested by the police. If actually the appellant had been arrested while standing along with Baldev outside the court of a Magistrate, which place is packed with

hundreds of people at that hour of the day, the appellant could very well raise hue and cry when he had been taken away by the police. But no such step was taken by the appellant. The attention of the Magistrate was also not drawn to this fact that he was being taken by the police and, threfore, he suspected for being falsely implicated in any case. It may be noted that the scooter recovered from the appellant belongs to his brother Daulat Ram. This is clearly deposed by Public Witness 10 Rakesh Kumar. The deal was struck through Public Witness 10, He deposed that Waryam Kaur had sold this scooter to Daulat Ram through him. Then he admitted in his cross-examination on behalf of the State that Nathu Ram (appellant) is the brother of Daulat Ram. If in fact, he had been arrested by the police while standing out said the court of Magistrate, it is really unimaginable how the scooter belonging to his brother would have come in the picture. Taking all these circumstances into consideration, I am of the view that the appellant was actually arrested near Basant Hotel where he has come on his scooter No DIS-3029. The appellant had himself opened the dicky of the scooter where from 4 Kgs. of charas was recovered by the Police.

(12) It is then argued that the keys of the scooter P-6 and P-8 were taken into police possession in the spot and none of these keys fitted in the lock of the dicky and, thereforee, the whole case against the appellant was false. In view of the ocular evidence comprising of the police officials as well as the public witness, this small infirmity is too insignificant All the witnesses with one voice have deposed that the appellant had come there on the scooter and it was from the dicky of that scooter that the charas weighing 4 Kgs. was recovered. In his statement under Section 313 Criminal Procedure Code the appellant nowhere says that he had any enmity with any of the police witnesses. He only stated that he was apprehended while standing out side the court of Sh. Aryan, Metropolitan Magistrate. As already stated above. I am not convinced with this defense.

(13) Now assuming for the sake of argument that there was some deviation by the investigating agency in the investigation of the case and it failed to comply with some provisions of the Act, can it be said that the whole trial stands vitiated on account of which the case of the prosecution should be thrown out and the appellant aquitted. In this respect, I would like to refer the case of Saliendranath

Bose v. The State of Bihar Air 1968 Sc 1292. It was a case under Section 161 Indian Penal Code and Section 5(2) read with Section 5(l)(d) of the Prevention of Corruption Act. The investigation in that case was conducted by an officer of the rank of Inspector Special Police Establishment whereas the investigation should actually have been done ordinarily by an officer of the rank of Deputy Suprintendent of Police or above. That Act also provided that an officer below the rank of Deputy Superintendent of Police could investigate those offences if he obtained the previous permission of a First Class Magistrate. On the basis of another authority of the Hon'ble the Supreme Court laid down in the case of State of Madhya Pradesh v. Mubarak All, : 1959 CriLJ920 , it was observed that it is desirable that the order giving the permission should ordinarily in the face of it disclose the reasons for giving permission to an officer below the rank of Deputy Superintendent of Police. In the case of Saliendranath (supra) the Magistrate had granted permission io the Inspector of the Special Police Establishment to lay down the trap. But the Magistrate did not give any reason for granting permission to the Inspector. In view of this the Hon'ble the Supreme Court observed that it was surprising that even after the court pointed out the significance of Section 5(A) of the Prevention of Corruption Act in several decisions, there are still some Magistrates and Police Officers who continue to act in a casual manner. It further observed that it was obvious that they were ignorant of the decision of the Court. But the legality of the investigation held in the case of Saliendranath (supra) was also not challenged in the trial court. No prejudice was pleaded much less established- Against the background of the above facts Hon'ble the Supreme Court held, 'An illegality committed in the course of an investigation does not affect the competence and jurisdiction of the court for trial and where cognizance of the case. in fact, been taken and the case has proceeded to termination, the invalidity of the preceding investigation does not vitiate the result unless the mis carriage of justice has been caused thereby.'

(14) In the present case also. the appellant did not show what prejudice was caused to him by the non compliance, if any. of the various provisions of the Act in the matter of sampling etc. thereforee, no mis-carriage of justice having been pointed out. the appellant cannot be permitted to take any advantage out of the cassenon-compliance of the provisions of the Act.

(15) Taking into consideration all the circumstances of the case, I am of the view that the appellant was rightly convicted and sentenced by the learned trial court, I, thereforee, see no merit in this appeal and the same is hereby dismissed

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