

Pradeep Kumar Vs. State

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Court : Delhi

Decided On : Aug-21-1989

Reported in : 39(1989)DLT456

Judge : Santosh Duggal, J.

Acts : [Narcotic Drugs and Psychotropic Substances Act, 1985](#) - Sections 21

Appeal No. : Criminal Appeal No. 187 of 1987

Appellant : Pradeep Kumar

Respondent : State

Advocate for Pet/Ap. : P.P. Grover, Adv

Judgement :

Santosh Duggal, J.

(1) In this appeal, the appellant challenges his conviction for offences under section 21 of the Narcotic Drug & Psychotropic Substances Act, 1985 (for short Ndps Act) as well as section 20 Part li of the aforesaid Act, recorded by judgment dated 30th May, 1987 as also order of sentence passed separately on 2nd June, 1987 whereby he was awarded rigorous imprisonment for ten years and also a sentence of fine of Rs. 1,00,000; sentence in default being further imprisonment for two years.

(2) As per prosecution case. on secret information having been received by Ast Om Parkash of Crime Branch (Public Witness .7), on 2nd May 1986 to the effect that a man named Kaka along with one Pradip was dealing in charas and that they were likely to carry the said commodity to Gole Market that day. the said Asi Om Prakash together with Si Surinder Singh (PW6), and four constables formed a raiding party under the supervision of Inspector Shamsheer Singh (Public Witness 5j and picketed near Bhartiya Poultry Farm in the Gole Market and that at about 5.30 in the evening, the appellant Pradip along with another person, identified later as Munir, were spotted coming from the side. of block 24 and on the pointing out of the informer, they were intercepted, and told that they were suspected of carrying contraband in the nature of charas and the police party intended to have their search.

(3) It is alleged that Ast Om Parkash, who is: investigating Officer of this case, informed Pradip, appellant herein, that if he wanted, he could have himself searched before a gazetted Officer or before a Magistrate but this offer was declined and thereafter the- card board box, which the appellant was found carrying in his right hand, was checked and it was found to contain two flat plates wrapped in a polythene paper which plate? were of charas of one kg. each. A sample of 10 grams from each of the plates was allegedly taken and placed in a parcel whereas the residue of the seized commodity was kept in a separate parcel and both the parcels were sealed with the seal of Asi Om Prakash, which after use were handed over to his colleague Si Surinder Singh. Incidentally, it is mentioned that this Si Surinder Singh had conducted search of the companion of the appellant, namely, Munir who also was found to be in possession of identical card board box, the contents whereof were also found to be two plates of charas each weighing one kg., and both these police officials, who are respective investigating officers in the two cases, booked simultaneously, and where proceedings were recorded at the spot, exchanged the seal used by them with each other.

(4) In so far as the present case is concerned, a rukka (Ex. Public Witness 7[A) was recorded about the recovery, and dispatched through constable Bir Singh (not examined) to the Police station Mandir Marg within whose, jurisdiction the recovery was effected along with sealed parcels with a request to the Sho to take

control of the seized sealed articles, and seal them. additionally with his own seal. The seizure memo (Ex.PW5/A) was also prepared as also a personal search memo of the accused. The sealed parcels, which were brought to the police station along with the rukka by constable Bir Singh. were deposited in the malkhana at the police station after the Sho Mukul Pal Rai Mehta (Public Witness I) and affixed his seal thereon. Thereafter, the seized samples were referred to the Central forensic Science Laboratory for opinion and on receipt of the report opining that on analysis the contents of the sealed parcels, gave positive test of charas, the case was sent to Court.

(5) After framing of the charge for the offence under section 21 of the Ndps Act, the trial was held and on the basis of the evidence adduced before him and after dealing with the arguments canvassed on behalf of the accused, the learned Addl. Sessions Judge held that there was no legal infirmity in the matter of investigation, found the charge proved and as noticed at the outset, recorded conviction of the appellant.

(6) This judgment is assailed in the present appeal on the grounds that' the learned trial court erred in accepting the prosecution case as proved inspire of the fact that the entire proceedings of recovery and seizure were full of suspicion, and there was no corroboration either by association of a public witness or by any type of written records, such as daily diary, entry about departure of the police party from the office of Crime Branch or about the receipt of the secret information and that it was a case where no implicit reliance could be placed on the testimony of the three police officials in the absence of any corroboration from an independent source. A legal plea about the charge having been framed defectively for the offence under section 21 of the Ndps Act treating charas as a manufactured drug has also been taken up, with the added contention that this vitiates the trial because a prejudice has been caused to the case inasmuch as 'charas' as per definition in the Act, was not a 'manufactured drug', but a direct product from the plant known as Indian Hemp or cannabis and that Realizing this error, the learned Judge has added section 20 Part Ii of the Ndps Act while recording conviction and that a legal infirmity has crept in the proceedings.

(7) Another contention set out in the grounds of appeal is that none of the statutory safeguards' as incorporated in the Act in the form of provisions contained in sections 42, 50, 52, 55 and 57 have been observed with the result that the entire case is rendered' dubious and the trial court has erred in overlooking all the infirmities in the case in spite of the plea to that effect having been raised before him during arguments.

(8) At the time of arguments in this appeal, Mr. P. P. Grover, appearing for the Appellant, reiterated the grounds as set out in the ground's of appeal, and noticed above. He argued in the first, place that the view taken by the learned trial court that 'charas' was a manufactured drug was wholly incorrect in face of the definition as contained in section 2(xi) of the Ndps Act as against the definition contained in section 2(iii) of the Act, and that in the absence of any notification as contemplated by sub-section (b) of Section 2(xi), there was no basis for the court to hold that charas also fell in the category of manufactured drug and that a definite prejudice had been caused to the accused' for having been convicted for offence under Section 20 Part Ii of the Ndps Act, when he faced charge only under Section' 21 of the Act, so much so that the case put up to him, while recording statement under Section 313 Criminal Procedure Code ., was also ts per charge; namely, possession of charas described; as manufactured drug.

(9) This contention, however, has not been pursued earnestly by Mr. Grover when pointed out to him that the fact that in the charge there was clear mention of the allegation of having been found in possession of 'charas' and it cannot be urged on behalf of the accused that he had been prejudiced in the trial because obviously he knew what accusation he was facing which was basically for alleged possession of charas. Rest of what was recorded in the charge, was a matter of technicality, as to whether it fell within the definition as contemplate in Section 2(iii) or could be categorised also as a 'manufactured drug' within the meaning of section 2(xi). This place is, thereforee, not such which can help the appellant.

(10) I would also like to dispose of another plea taken up in the appeal, though not pursued vehemently, as to the case falling within the jurisdiction of Punjab Excise Act as extended to Delhi where punishment for similar offence was far lesser than

as contemplated under section 20 of the Ndps Act, and thus the provisions are hit by Articles 14 and 21 of the Constitution.

(11) This plea is based on a misreading of the provisions of the Act because a reading of section 81 of the Ndps Act reveals that only those provisions of the provincial Act or an Act of State legislature have been saved which provide for punish merit not imposed, or provided under this Act, or imposes any restriction or provides for a punishment greater in degree than a corresponding punishment provided by the Ndps Act. The clear implication is that where the punishment provided in the present Act is heavier than that provided by the. State Act, then the Ndps Act would prevail and to that. extent it cannot be said that the provisions of the State Act have been let to operate parallely.

(12) Reverting to the merits, however, I find great deal of force in the contentions canvassed on behalf of the appellant, by Mr. Grover to the effect that the investigation is full of many infirmities, and that none of the requirements contemplated by various provisions of the Ndps Act have been observed with the result that u can certainly be held to be a case where the trial court has erred in holding the case established against the accused.

(13) In the first instance Mr. Grover argued that the statement of the Sho examined as Public Witness 1 makes it very clear that the seized commodity was not produced before him, nor the accused immediately on alleged recovery as mandated by the provisions of Section 52(3) of ihe Ndps Act, which enjoins upon the seizing officer to forward without unnecessary delay to the officer in charge of the nearest police station the articles seized and the person arrested.

(14) In the present case, a-: per statement of the Investigating officer, 'the accused was intercepted at about 5 p.m. when recovery is stated to have been made from him but at no stage any information was sent to the Sho of police station Mandir Marg, which was the nearest police station' of the area, and it was only after about 3 hours that the information in the form of rukka was sent along with the sealed parcels.

(15) The learned counsel contended that this was not the intention of the statute, and it has been held already by this Court in the case of *Rajesh v. State* 1989 (1) DL 359. (1) that the intention of the Legislature, in view of the gravity of the offence and severity of the punishment provided, was that a senior officer such as station house officer of the police station of the area takes charge of the seized article as well as the arrested person and then supervise the proceedings as to sampling, sealing and deposit of the case property in the malkhana at the police station. The officer other than the Sho can put his seal on the parcels of samples and the remaining bulk only in addition, in case the Sho directs him to take the case property to the police station for deposit in the malkhana. He submits that this procedure has been merely forsaken in the present case, inasmuch as the Sho was not informed of the recovery or arrest of the accused in the manner contemplated by section 52(3) nor the proceedings conducted in the manner laid down by section 55 and that the entire investigation has been taken over by Asi Om Parkash (Public Witness 7) and on the authority of the decision in the case of *Rajesh* (supra), on this ground alone, the conviction was liable to be set aside.

(16) I find substance in this submission because for detailed reasons recorded in the case referred to above, I have held that the provisions of section 55 and section 52(3) of the Ndps Act cannot be treated as empty formalities, but are substantive provisions, to ensure authenticity of the recovery, by making senior officer responsible for the proceedings of sampling, sealing and deposit in the malkhana.

(17) In the present case the Sho has been confronted with fait accompli by being sent sealed parcels whereas every proceeding was conducted and finalised by the Ast at the spot.

(18) No one appeared for the State in spite of the appeal being on board for a number of days, to show as to why the ratio of the judgment in the case of *Rajesh* (supra) shall not be applied in the present case. The trial court has countered the defense plea in this regard, by saying that the proceedings had been conducted in the presence of Inspector Shamsheer Singh (Public Witness 5). The said reasoning is fallacious for the reason that Inspector Shamsheer Singh is neither shown to

have been the next immediate officer of the investigating officer within the meaning of section 57 of the Ndps Act nor as head of the raiding party, because he no where states that it was under his direction or supervision that the investigating officer Ast Om Parkash noted, or conducted the proceedings.

(19) It is a case where the proceedings are rendered suspicious for the reason that even the Sho is contradicted by Hc Om Parkash, Moharrir Malkhana (Public Witness 2) because whereas the former deposed that he deposited the sealed articles brought to him by constable Bir Singh in the Malkhana, the Malkhana Moharrir very categorically deposed that this was done by Asi Om Parkash. Constable Bir Singh who is stated to have been deputed to go to the police station with the rukka and sealed parcels, turn being handed over to the Sho, has not been examined. The entry in the Malkhana register proved as Ex. Public Witness 2/A clearly records that the sealed parcels had been brought by Asi Om Parkash of Crime Branch, and deposited in the Malkhana. This makes the prosecution case doubtful even on the point as to whether the sealed parcels were at all sent to the Sho, as now sought to be made out. Since the Sho has been contradicted by the deposition of the Malkhana Mohrrir, as well as by the entry in the Malkhana register, the possibility cannot be ruled out that it was at a much later stage than shown that Asi Om Parkash got the seals of the Sho put up on the sealed parcels and then deposited them in the Malkhana because the timing of deposit is not shown in the Malkhana register and there is no corroboration. constable Bir Singh having not been examined to say that these sealed Singh having not been examined to say that these scaled the Sho at the lime as given out by the investigating officer. It is regrettable that a senior officer like the Sho has abdicated his responsibility and did not take care to ensure that the procedure as contemplated by section 55 of the Act is observed, and he has even made statement which is contradicted by the written entries in the Malkhana register and thus no implicit reliance can be placed on his testimony that it was he who had deposited the walled parcels in the Malkhana.

(20) Apart from the fact that this lapse by itself, namely, non-compliance with the provisions; of section 55 of the Act. and non-observance of the requirements of section 52(3) of the Ndps Act would be enough to vitiate the prosecution case,

there are additional features or record which make the prosecution case suspicious. It is to be noted that the investigating officer after use, handed over the seal to his colleague Si Surinder Singh who was conducting parallel proceedings in respect to the other companion of the present appellant and who is investigating officer of that case registered simultaneously and he in turn handed over the seal after use to Asi Om Parkash investigating officer of this case. Both are obviously interested in the cases booked by each of them, and by handing over the seals to each other, with Inspector Shamsheer Singh remaining silent spectator, introduce an element of suspicion in the whole case because object of the provision for sealing of the seized article and the samples taken, is defeated when the seal is out entrusted to an independent person or a senior officer.

(21) Another safeguard which could ensure the sanctity of the seal, was the affixation of the specimen of the seal on the Cfsi form which had to be done simultaneously together with the sealing of the parcels and although the learned counsel for the appellant could not show any written instructions to that effect, but there is justification in his submission that the whole purpose would be defeated if the Cfsi form containing the specimen of the seal, is not deposited in the Malkhana, together with the sealed parcels, because only that course can provide an assurance that the seals have not been tampered with.

(22) What happened in the present case is that although Cfsi form is stated to have been filled up simultaneously with the sealing of the parcels, it was never deposited in the Malkhana with those parcels. On the other hand, investigating officer Om Parkash has himself made the position clear, by stating that he handed over the Cfsi form to constable Rani Dass (Public Witness 4), who was entrusted with taking of the sealed parcels from the Malkhana and deposited in the Cfsi Office, which he did on 8th May, 1986. The constable has also deposed categorically that the Cfsi form was handed over to him by Ast Om Parkash on the date he was told to take the sample from Police Station, Mandir Marg. In face of this, it is clearly a case where apart from the fact that the seal used was not handed over to an independent or senior officer, but to the colleague, who was investigating officer in the parallel case, and who had given his seal to the present investigating officer and both of whom returned each other's seal admittedly after

8110 days; otherwise also the suspicion is re-inforced by the fact that even the Cfsi form, with specimen seals, was not deposited in the Malkhana simultaneously with the sealed parcels. This accompanied with the fact that the Sho never supervised the sealing of the parcels, as required by section 55 of the Ndps Act, nor did have the property deposited personally or under his supervision; makes it a case where it cannot be said with reasonable certainty that the seals put on the parcels, containing samples would not have been tampered with at any subsequent stage, as there is no guarantee on the record of the case against meddling with the seals and thus it cannot be said beyond shadow of doubt that the sealed parcels sent to the Sfsi were same as contained the samples of the article allegedly seized from the appellant.

(23) In this setting of facts, a gnawing suspicion is raised about the whole case when it is further observed that there is no proof or written record to bear out the investigating officer and the other two police officials that it was pursuant to secret information received at about 3 p.m. in the office of the Crime Branch that raiding party had been formed. Neither any record about receipt of secret information has been shown to have been maintained nor even the daily diary entry regarding departure of the police party from the office of the Crime Branch at the said time or in pursuance to the receipt of the secret information produced.

(24) In case *Jayapalan v. State*, : 37(1989)DLT289 (2), a learned Single Judge of this Court held that where the copy of the daily diary entry containing the information stated to have been reduced into writing was not produced, it would mean to be a case where the provisions of section 42 of the Act were not shown to have been complied with. It is true that the trial court has held that in the present case the recovery is in terms of section 43 of the Act, and not section 42, and so recording of secret information was not statutorily necessary but the fact remains that such an entry would have lent unimpeachable corroboration to the prosecution case, and thus a serious doubt raised about genuineness of the prosecution case avoided.

(25) The Explanationn of the police officials that no such record was required to be kept in the Crime Branch is not acceptable because in the defense evidence daily

diary registers were called, and entries proved, which revealed that in certain events, the factum of the police party departing from the Crime Branch office on receipt of information had been recorded in the daily diary register as proved by copy Ex.PW7/DA; including one on 2nd May, 1986 itself regarding Inspector Shamsheer Singh having proceeded at 9.05 a.m. with staff, and on the same day there is another entry as shown during cross-examination of Public Witness 7 who had brought the daily diary register to court on direction given that one St Anand Sarup had proceeded at 9.50 a.m. for investigation of a case registered at police station Janakpuri and the return of the said officer is also shown vide entry No. 39. These entries thus give a lie to the statement of the investigating officer as well as other police officers that no daily diary register is maintained at the Crime Branch, and that no such entry of departure or forming of raiding party on secret information or that of return is made.

(26) The fact that in spite of a daily diary register being maintained in the office of the Crime Branch, at Police Head Quarters, and where entries of other officers proceeding for investigation including Inspector Shamsheer Singh, a witness in this case, were shown to exist, while there is no mention in the daily diary register either of receipt of secret information or formation of the raiding party or departure of the said party under supervision of Inspector Shamsheer Singh or otherwise; as made out, the whole case becomes suspicious; the benefit whereof has to go to the accused.

(27) In view of the various features noted, which render the prosecution case about recovery from the accused, or even the formation of the raiding party or their picketing near the spot, as stated by them, doubtful and a? such I do not feel it necessary to go into other questions as to the applicability or other provisions of the Ndps Act to the present case because the prosecution is bound to fail on the short ground of non-observance of the procedure as laid down in section 55, and non-compliance with the requirements of the said provisions; coupled with the provisions of section 52(3) of the Ndps Act and because of the other infirmities noted above which make the statements of the prosecution witnesses, namely, Inspector Mukul Pal Rai Mehta (Public Witness 1), Inspector Shamsheer Singh (Public Witness 5), Si Surinder Singh (Public Witness 6) and Asi Om. Parkash

(Public Witness 7), vulnerable and not worthy of reliance, as being devoid of corroboration, that could be available. I, accordingly, hold it to be a case where the trial court fell into error, in rejecting the defense pleas, and holding the prosecution case proved.

(28) As a result, the judgment recording conviction as also order of sentence are held liable to be set aside. I accordingly allow the appeal and set aside the judgment dated 30th May, 1987 recording conviction, as also order of sentence dated 2nd June, 1987. The appellant shall be set free immediately, if not required in any case.

(29) No order as to costs.

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