

Sunil Kumar Vs. State

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Court : Delhi

Decided On : Oct-18-1989

Reported in : 1990CriLJ414; 40(1990)DLT158

Judge : R.L. Gupta, J.

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

Appeal No. : Criminal Appeal Nos. 166 of 1988 and 23 of 1989

Appellant : Sunil Kumar

Respondent : State

Advocate for Pet/Ap. : S.K. Agarwal and; K.K. Bakshi, Advs

Judgement :

R.L. Gupta, J.

(1) This judgment will dispose of Crl.A. No. 23/89 and Crl.A. No. 166/88. The appellants in both these appeals were apprehended at the same time while traveling on a two wheeler scooter along with a third person.

(2) Vide two separate judgments/orders sentence dated 29.11.88/ 10.12.88 the learned Addl. Sessions Judge, New Delhi convicted the appellants under Section 21 of the Narcotic Durgs and Psychotropic Substances Act 1985 (hereinafter

referred to as the 'Act') and sentenced them to suffer rigorous imprisonment for ten years and also to pay a fine of Rs One lac or in default suffer further rigorous imprisonment for two years.

(3) The story of the prosecution is that for some days superior to 23.12.86 the police had information that some persons used to supply heroin to their known parties by coming near Shivaji Restaurant at Bhagat Singh Marg, New Delhi. On 23.12.86 Si Surinder Singh was present in office of the Crime Branch at Police Headquarters when he received secret information that three persons will come on a two wheeler scooter at Shivaji Restaurant, Bhagat Singh Marg, and will deliver heroin to their respective parties at about 5.30 P.M. On the basis of the prior information as well as Secret information received that day a raiding party consisting of Si Om Prakash, Si Jagpal Singh. Hc Harbir Singh and 3-4 constables was organized by Si Surindar Singh. All of them went near Arora Pan Bhandar situated at Bhagat Singh Marg near ShivaJi Stadium. Si Surinder Singh asked 8-10 persons to join the raiding party but they declined by expressing their inability and went away. Si Sukesh Kumar and one constable of Police Station Mandir Marg also met the party there by chance. They were also apprised of the secret information and were included in the raiding party. They picketed a Nakabandi near that place in such a manner that their presence was not felt by the anybody. At about 5.30 Pm one two wheeler scooter driven by Surjit Singh, appellant arrived there. One Muni Lal and the appellant, Sunil Kumar were occupying pillion seat of the scooter. On the pointing out of the Informer they were apprehended while Surjit Singh, appellant was parking the scooter. Si Jagpal Singh PW8 informed Sunil Kumar appellant that they were police officers and they wanted to search them because the had information that they had heroin. They also told the appellants that they were at liberty to take their search and also if they desired their search before any Gazetted Officer or a Magistrate. But the appellant, Sunil Kumar and others declined either to search any member of the police party to be searched in the presence of a Gazetted Officer or a Magistrate. The appellant, Sunil Kumar was then search by Si Jagpal Singh. From the right pocket of his pant heroin wrapped in a wax paper was recovered. It weighed 150 grams. 10 grams was separated as sample. The sample and the remaining heroin were separately sealed in two cloth parcels and sealed with the seal impression Jps belonging to Si

Jagpal Singh. Form CfsI was also filled up at the spot. Case property was seized vide Memo Ex., PW4/A. Jagpal Singh also prepared rukka Ex. PW8/A and sent it along with the case property and from CfsI to police station Mandir Marg through constable Harbir Singh for registration of the case and also for sealing the case with property the seal impression of the SHO. The site plan Ex. PW8/B was also prepared by him. He also subjected the appellant Sunil Kumar to a personal search and prepared the personal search memo Ex. PW4/ in his own hand. The sample parcel of this case was taken to CfsI by PW6 Ram Daras constable on 2.1.87. The report of the CfsI is Ex. PW2/A according to which the sample gave the positive test for heroin. After completion of necessary investigation the challan was filed in the court and the appellants were convicted and sentenced as stated above.

(4) I have heard learned counsel for the parties and have also perused the records of the trial court file including the evidence. CrI. A No. 23/89

(5) Learned counsel for the appellant has challenged the conviction and sentence of the appellant on a number of grounds. His arguments in brief are that in spite of the fact that the police had advance information about the activities of the appellant and others, it did not join any public witnesses. Moreover all the offices near the alleged place of recovery were open and hundreds of employees were working near that place. It is then argued that the information received by Si Surinder Singh was allegedly reduced into writing and sent to Acp Sh. P.S. Bhushan but no such information was brought on record during the course of the trial. In this manner there was violation of Section 41(2) and Section 42 of the Act. It is also argued that although it was admitted that some of the police officers of Police Station Mandir Marg joined the raiding party but none of them was cited as a witness in this case and that the story put forward by the prosecution was unnatural and inherently improbable because it could not be believed that three persons indulging in the same type of nefarious activities would act in concert because they were competitors in the same trade and would not travel together. Besides, there were material contradictions in the statements of various prosecution witnesses and also there was violation of Section 55 read with Section 52(3) and also of Section 57 of the Act because information was not conveyed to

any of the senior officers within 48 hours as contemplated by that provision All these arguments have been countered on behalf of the State.

(6) So far as the contention that inspire of the fact that the police had information a few days in advance about the nefarious activities of the appellant and even then they did not join any public witnesses is concerned, I think it was not genuinely possible for the police to join any such witness. The names and other particulars of the persons allegedly indulging in such activities were not known to the police. It was also not known when they were likely to arrive with the contraband article at Bhagat Singh Road. In such circumstances it would be quite unreasonable to expect that the police would sound any public witnesses to keep ready to join them as and when they are called. In all such cases the police can make efforts to join public witnesses at the time when it has information about the chances of recovery of any contraband article in the near future. It has come in evidence that this secret information about the coming of certain persons at Bhagat Singh Marg was received at about 4.15 Pm in the office of the Crime Branch. The secret information further was that such persons will be reaching Bhagat Singh Marg at about 5.30 PM. thereforee, the police party had to start immediately from the office of the crime branch so that they do not get delayed in reaching the spot and afford a chance to the offenders to get away from there. In the circumstances, they could have made an attempt to join the public witnesses only after reaching the spot or on way to the spot. thereforee, it will be seen that the raiding party did not have much time at their disposal in this case But inspire of that it has come in evidence that some 8 or 10 public persons were asked to join the raid but they declined and went away from the spot. It has also come in the cross-examination of PW5 Surinder Singh Si that a constable had brought one of the waiters of a hotel, who stayed there for 2-3 minutes only. So we are faced with a situation where on one hand certain persons suspected to be in possession of contraband articles are about to arrive at the spot and the public persons almost immediately before such time reluctant to join the investigation. I think it may to expecting too much from the police in such circumstances that it would take action against such public persons for not joining the raid party because if the police adopts that course, the guilty persons are likely to become conscious of the presence of the police at the spot and thus make good their escape.

(7) The effect of non-joining of public witness has been commented upon on a number of occasions by various High Courts and Hon'ble the Supreme Court. However, I would like to mention only two of those authorities which are quite recent. The first is in the case of Chander Shekhar and Others v. The State. 1986 (2) Crimes 419, a judgment of a Division Bench of this Court in which it was observed as follow :-

'ONE of the greatest disadvantages of living in highly urbanized areas is that people are out of sympathy with their neighbours and fellow citizens. This is for a variety of reasons. None wants to get involved in such matters. Our experience is that in the recent past it is really becoming difficult to involve public witnesses in court cases particularly in cases of capital offences. It is common-place experience that in Delhi if an accident takes place, hardly any body feels concerned. Life is so mechanical and fast that no body has time to sympathise with a fellow citizen. We blame none for it as this is the life style growing in highly urbanized areas. Even those who feel concerned keep away for fear of their own security and getting involved in toady proceedings There is a subdued murmur that the law and order agency has failed to provide security to the law abiding citizens and, what rules, now, is the might and ingenuity of the criminals. Under these circumstances it will be dangerous not to rely on relation witnesses and police witnesses in such matters Of course, provided, such witnesses are confirmed to be truthful when tested at the yardstick of the peculiar facts and circumstances of each case.'

(8) The second authority is a very recent judgment of the Supreme Court reported as Appabhai and another v. State of Gujarat, : 1988 CriLJ848 . In that case also the contention was that the failure of the prosecution to examine independent witnesses present at place of the incident threw serious doubt on the prosecution case itself. This contention was repelled and it was held :

'IT.is no doubt true that the prosecution has not been able to Produce any independent witness to the murder that took place at the bus stand. There must have been several of such witnesses. But the prosecution case cannot be thrown out or doubted on that ground alone. Civilized people are generally 'insensitive

when a crime is committed even in their presence. They withdraw both from the victim and the vigilante. They keep themselves away from the Court unless it is inevitable. They think that crime like civil dispute is between two individuals or parties and they should not involve themselves. This kind of apathy of the general public is indeed unfortunate, but it is there everywhere whether in village life, towns or cities. One cannot ignore this handicap with which the investigating agency has to discharge its duties. The Court, therefore. Instead of doubting the prosecution case for want of independent witness must consider the spectrum or the prosecution version and then search for the nugget of truth with due regard to probability if any, suggested by the accused.

(9) In the present case also the criticism leveled against the prosecution case is that hundreds of independent persons were available to the police but none of them was joined in the investigation. The situation of this case is fully covered by the observations of Hon'ble the Supreme Court extracted above and, therefore, saying much on this aspect would not be necessary. In such a situation, therefore, the safest course open to a Court is that it should carefully scrutinise the evidence of police witnesses and if their evidence is otherwise trustworthy and inspires confidence and they also do not appear to have any motive to falsely implicate the accused, there is no reason why they should not be believed. In this case the defense raised by the appellant Sunil Kumar in his statement under Section 313 Code of Criminal Procedure is that he was earning his livelihood by supply of general merchandise including imported items to various shopkeepers and also to the stall holders who put their stalls in front of the shops after the close of the market in Karol Bagh area. His uncle Ashok Bhatia DW2 had also been putting up one such stall during evenings to earn his livelihood. On that evening he had to collect Rs. 2, 000.00 from Davender Singh DW1 for the goods which he had supplied to him. Since he could not locate Davender Singh, on coming to know that he had gone to Gali No. 8. Dev Nagar, he went there to make enquiries about Davender Singh. He saw a police jeep parked there. On suspicion, he was apprehended by the police and taken to Police Station Mandir Marg. In fact he was arrested because of enmity between his uncle Ashok Bhatia Dw 2 and the police. therefore, it was only this circumstance of the alleged enmity of his uncle Ashok Bhatia with the police on account of which he claims to have been falsely

implicated in this case. But in this respect it must be stated that the appellant has not adduced any cogent evidence. He did examine Ashok Bhatia as Dw 2. He stated in his examination in chief that he knew one Si Om Parkash who was inimical towards him because inspire of demand he did not make payment of certain articles purchased by the Si from him. He further claimed that the Si had threatened him that he was working in the crime branch and he would teach him a lesson. He admitted in his cross-examination that he had not lodged any report in this respect to any authority and also did not disclose any such fact to any other person. But just after a few lines in cross examination, he shifted his stand and stated that he had given a complaint in this respect to Dcp Crime Branch and simultaneously produced a purported copy of such a complaint which is Ex. DA. This evidence has to be rejected for the reason that no effort was made by the appellant to get produced on record the original of this complaint. He also blows hot and cold in the same breath, by first saying that he did not lodge any complaint and then changing to an affirmative statement. thereforee, the possibility of this carbon copy having been fabricated for using it in evidence cannot be ruled out. The witness admitted that he had not given this copy even to the defense lawyer prior to that date. He also admitted in his crossexamination that the police did not know the appellant earlier. Even otherwise. Ex. Da indicates that the appellant was arrested from Karol Bagh, whereas in Court the evidence has been led to show that he was arrested from Dev Nagar. This statement, thereforee, completely belies the defense of the appellant that he was implicated in this case falsely on account of the alleged enmity between Ashok Bhatia and Si Om Parkash.

(10) Learned counsel for the appellant then drew my attention to the statements of witnesses and argued that there were material contradictions in their statements on account of which the prosecution evidence should not be believed. According to him PW-4 stated that there was a Restaurant in the alleged 15-20 steps area adjoining Arora Pan Bhandar and that they did not go to that Restaurant in the lane adjoining the Arora Pan Bhandar. As against that PW-7 Hc Harbir Singh stated that there was a small book shop at the corner of the road and Pan shop at the other corner of the road. He further stated that the Restaurant where they bad gone is after going 15-20 steps inside the road away from the road of Arora Pan Bhandar. Thus according to the learned counsel the place of alleged recovery was

different according to the different prosecution witnesses. Such an argument was also advanced before the learned trial court and was not accepted as such to cast any damage to the case of the prosecution. It may be noted that the two places about which the discrepancy is alleged are within a range of 15 to 20 steps. The raiding party consisted of a number of police officials. One can visualise that the different members of the raiding party cannot stand at one point and they must have spread out within a distance of 15 to 20 steps at least. thereforee, the alleged place of recovery in any case being within 15 or 20 steps, it cannot be said that there is any material contradiction in the prosecution evidence regarding the place of recovery. thereforee, much importance cannot be given to any such minor contradiction.

(11) It is then argued that although it is claimed in the prosecution case and evidence that the information received by the police was reduced into writing and forwarded to Acp P.S. Bhushan the same has not been brought on record. In this respect it may be noted that it was a secret information and it must have contained the name of the informer. For obvious reasons such a written information cannot be brought on record because in that case there is a danger of the name of the secret informer being leaked out and in that case he is likely to suffer harassment at the hands of persons who indulge in such activities. Moreover, it may be noted that the recovery of the contraband article in this case is not covered by Section 41 or Section 42 but by Section 43 of the Act. because the information was that some persons would be reaching on a public place while in transit. Sections 41 and 42 apply when there is prior information about the presence of a contraband article in any building, conveyance or place. Section 43 applies when the information as such is not about the presence of a contraband at any of such places, but that such article is likely to be brought in any public place. If in such process of carrying the article some conveyance is used, the same is also liable to confiscation.

(12) It was also argued that admittedly some police Officials of Police Station Mandir Marg had come to the spot by chance and none of them was cited as a witness in this case. I think it hardly makes any difference because even then the argument that no public witness was joined would have remained open to the applicant and the evidence of even those police officials would have been

subjected to the same criticism which is being leveled now against the other police officers. The further contention is that it was inherently improbable if three persons indulging in the same activities would travel together on one conveyance for supply of their respective contraband articles to their customers or acquaintances because they in fact are rivals in their trade and would never like to disclose their secrets to each other. This argument also does not seem to have much before. The prosecution does not seem to gain any advantage by putting forward such a case, if actually it had not happened in that manner.

(13) So far as the alleged violation of Sections 55 and 52(3) of the Act is concerned, I am of the view that in the first instance there does not seem to be any violation of Section 55. After his apprehension at the spot, the contraband article was seized from the appellant. After separating a sample of 10 grams both the sample and the remaining heroin were separately sealed with the seal of the Investigating Officer. The case property was then forwarded to the police station where the Sho, PW3 Inspector Prem Singh Patwal was entrusted with the same by Hc Harbir Singh. He has deposed that both the packets were sealed with the seal of JPS. He then affixed his own seal impression Psp upon both these parcels and entrusted them to Malkhan Moharar for deposit in the Malkhana. The appellant was apprehended at about 5.30 P.M. whereas the case property was brought to PW3 at about 6.50 PM. So within almost one hour and 20 minutes of the recovery of the case property, it was produced before the officer-in-charge of the Police station. There is no cross examination of either of the witnesses to indicate that the case property was tampered with on the way from the spot to the police station. Otherwise in view of the statement of the Sho as PW3. that he received the case property in the police station duly sealed with the seal impression Jps an inference can be drawn that it was not tampered with on the way. That packets were deposited in the Malkhana with both the seal impressions has not been challenged. It has also come in the evidence of PW6 Ram Darasth^{ton2.1.87} when he obtained the sealed sample parcel from the Moharar Malkhana of Police Station of Mandir Marg, it bore both the seal impressions. The mandate of Section 55 of the Act is that Officer- in-charge of the Police Station is under an obligation to allow the Investigating Officer to affix his seal on such articles. It is only after that the Sho is supposed to affix his own seal

impression upon the case property. In similar circumstances I had held in *Nathu Ram v. State*, reported in 1989(3) DL 38 that the even if case property and the samples extracted there from are sealed at the spot by the investigating officers, the irregularity or the illegality stands immediately cured when the officer-in-charge of the police station affixes his own seal on such property either at the spot or in the police station. The spirit underlying Section 55 seems to be that the Officer-in-charge of the police station must ensure that the case property and the sample extracted there from by the investigating officer are not tampered with in any manner whatsoever. therefore, the section enjoins that the officer-in-charge of the police station should not deposit the case property in the Malkhana without affixing his own seal impression in addition to the seal of the investigating officer. The prosecution evidence in this case clearly indicates that the case property was deposited in the Malkhana with both the seal impressions intact, that at the time of the sample being taken out from the Malkhana the seals were intact, and that it was received in CfsI with both the impressions intact is duly testified by PW2 N.K Prasad Senior Scientific Officer. Taking into consideration the totality of circumstances and evidence on record, I am of the view that there is no violation of Section 55.

(14) Another contention raised by the learned counsel for the appellant is that there was also violation of Section 52(3) of the Act because there was no evidence to indicate that the appellant after arrest was forwarded to the officer-in-charge of the nearest police station from the spot. In this respect, there is some minor discrepancy in the prosecution evidence. PW4 Si Om Parkash has stated in cross-examination that after the completion of the proceedings of the investigation at the post all the three Investigating Officers including himself had taken the accused persons to police station Mandir Marg. PW8 Jagpal Singh Si who is the Investigating Officer of this case stated that he had gone to Police Station Tilak Marg from the spot whereas the other two investigating officers Surinder Singh and Om Prakash had gone for the search of the house of the other two accused Surjit Singh and Muni Lal. Om Prakash also corroborates that the houses of Surjit Singh and Muni Lal were searched. therefore, there is minor discrepancy between the statement of these two witnesses. However, it may be noted that the statements of the witnesses were recorded after about 1' years of the occurrence

and such minor discrepancy can arise due to lapse of memory. Otherwise the broad features of the case are not different according to both these witnesses because both of them have deposed about the search of the houses of Surjit Singh and Muni Lal. It was then contended that there was also violation of Section 57 of the Act because after the arrest of the appellant and seizure of the contraband article, on full report was made by the Investigating Officer of such arrest or seizure to his immediate superior Officer. In this respect it may be noted that the Fir was registered at Police Station Mandir Marg about this case and copies of such Fir were duly forwarded to the Area Magistrate as well as other superior officers. therefore, in such circumstance, to expect that any special report should be forwarded by the Investigating Officer will simply amount to duplication of the proceedings and it can very well be presumed that there was compliance of Section 57 when the Fir was recorded because the Fir contains full report of all the particulars of the arrest and the seizure.

(15) Assuming for the sake of argument that there was non-compliance to some extent of the various provisions of the Act referred above, what has to be basically seen in such cases is whether there is any suspicion regarding the recovery of the contraband article from the appellant. All the safeguards in the various provisions are incorporated only to ensure whether in fact there has been recovery from the accused. In the case of *Radha Kishan v. State of Uttar Pradesh*. : (1963)11LLJ667SC the Supreme Court had occasion to consider as to what was the effect of certain procedural formalities having not been followed by the police while conducting search under Section 103 of the Code of Criminal Procedure 1898 Hon'ble Court held that if the search was in contravention of Section 103, it could be resisted by the person whose premises are sought to be searched. Another consequence that may follow is that because of the illegality of the search, the Court may be inclined to examine carefully the evidence regarding the seizure. But beyond these two consequence no further consequence ensues, and the seizure of the articles is not vitiated. In the present case also, even assuming that there is violation to some extent of any of the provisions of the Act the only consequence that may follow is that the evidence of the witnesses and specially in a case where the witnesses are only of police department, their evidence should be scrutinised more closely. If there are other circumstances to indicate that the

police did not fairly or that it had a motive to implicate the accused then the recovery of the articles may be vitiated. I have already found above that the only defense of the appellant that he had been implicated because of enmity of his uncle with the police, is not worthy of credit. So I do not find any reason to disbelieve the recovery of heroin from the appellant because in that respect the evidence of the witnesses is cogent, convincing and trustworthy. The appeal, therefore, has no merit. CrI. A. No. 166/89

(16) Learned counsel for the appellant in this appeal contended that no public witness in this case was joined, that the scooter allegedly seized from the appellant was not exhibited during evidence, that there was delay in the dispatch of the sample of ten days for Chemical examination, that there was non-compliance with the provisions of Section 57 of the Act and also there was non-observance of the provisions contained in Section 57 of the Code of Criminal Procedure.

(17) So far as the contentions regarding non-joining of public witnesses and the violation of Section 57 of the Act are concerned, same have been discussed in detail in CrI. A. No. 23/89 and found to have no force.

(18) So far as non-seizure of the scooter which was being plied by the appellant is concerned, it may be noted that the contention that it was not taken into possession at all does not seem to be correct. It is in the statement of Public Witness 4 that the scooter in question was taken into police possession vide Memo Ex. PW4/A. However, the scooter does not seem to be exhibited during the course of the trial showing thereby that it was not brought to court. But in this respect no cross-examination was directed on behalf of the appellant to show that actually no such scooter was taken into police possession. This fact will clearly show that the appellant at the Stage of recording prosecution evidence did not challenge the seizure of the scooter. therefore, it cannot be said that the prosecution case stood vitiated on any such count. The contention that there was non-compliance of the provisions of Section 157 of the Criminal Procedure Code also does not impress me. PW-5 Head Constable Harbir Singh has deposed that he took rukka of this case to the police station. He handed over the rukka to the

duty officer to register the case. The Fir, carbon copy of which is Ex. PW3/A was promptly recorded and there seems to be no loss of time in recording of the FIR. It has not been brought out in cross-examination of any of the witnesses if there was any delay in recording of the FIR. Also no circumstance has been pointed out which could indicate that Fir was recorded later. Section 157 contemplates that if from the information received or otherwise an Officer-in-charge of a police station has reason to suspect the commission of an offence which he is empowered under Section 156 to investigate, he shall forthwith send a report of the same to a Magistrate empowered to take cognizance of such offence upon a police report and shall proceed in person, or shall depute one of his subordinate officer not being below such rank as the State Government may, by general or special order, prescribe in this behalf, to proceed, to the spot, to investigate the facts and circumstances of the case, and, if necessary, to take measures for the discovery and arrest of the offender. In this case it may be noted that the investigation of the offence had already commenced after the arrest of the appellant. The rukka was forwarded to the police station by the Investigating Officer for the recording of the formal Fir and also to bring all the relevant facts to the knowledge of the officer-in-charge of the police station. The Sho, therefore, was not required under Section 157 of the Code to proceed to the spot after he received the rukka and the case property in the police station. therefore, question of non-observance of the provisions of Section 157 of the Code does not arise.

(19) The contention that the sample was sent to Cfsi after 10 days for Chemical examination does not seem to cast any doubt on the case of the prosecution. The fact remains that the sample parcel at the time of deposit in the Malkhana bore the seal impressions of both the investigating officer as well as the Officer-in-charge of the police station. PW2 Ram Daras Constable took this sample parcel to Cfsi after obtaining it from the Moharar Malkhana of Police Station Mandir Marg. He has deposed that at that time the seal impressions Op and Psp were intact and so long as it remained in his custody, it was not tampered with therefore, the seal impressions on the sample parcel having remained intact up to the time it was deposited in Cfsi, the delay of 10 days in sending it to Cfsi has no adverse effect on the case of the prosecution. I, therefore, see no merit in this appeal also.

(20) As a result of the discussion above, I do not find any merit in either of these appeals and same are hereby dismissed. The sentence awarded to both the appellants being the minimum permissible under the Act are hereby affirmed.

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