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WaisuddIn Vs. State (Delhi Administration)

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Court : Delhi

Decided On : May-25-1990

Reported in : 1991CriLJ134; 42(1990)DLT176; 1990(19)DRJ85

Judge : P.K. Bahri, J.

Acts : Narcotic Drugs and Psychotropic Substances Act, 1985 - Sections 55

Appeal No. : Criminal Appeal Nos. 80 and 243 of 1987

Appellant : Waisuddin

Respondent : State (Delhi Administration)

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

Judgement :

P.K. Bhar, J.

(1) The appellant, who has been convicted of an offence punishable under Section 21 of the Narcotic Drugs and Psychotropic Substances Act vide judgment dated February 23, 1997 and has been sentenced to rigorous imprisonment for ten years and to pay a fine of Rs. l,00,000.00 (one lakh) and in default, to further undergo rigorous imprisonment for 2 1/2 years by subsequent order dated February 26, 1987 by an Additional Sessions Judge, New Delhi, has filed this appeal challenging his conviction and sentences.

(2) Another appeal moved by the same appellant through Jail, being Criminal No. 243/87, is also being disposed of with this appeal. 2A. The facts of the case, in brief, are that Shri Tarsem Pal, Inspector Crime Branch, had some secret information with him that one Afghan national named Noori was indulging in large-scale in supply of drugs like heroin and was resident of Greater Kailash Part-II, House No. 553 and that he had also engaged other Afghan nationals in this nefarious

(3) Inspector Tarsem Pal deputed Si Jagbir Singh and Si Swatantra Kumar to develop some concrete information and on December 23, 1985, a secret informer is stated to have come to the Crime Branch at about 12 Noon and informed that certain persons of Noori would be passing nearby Savitri Cinema at about 2 P.M and would be proceeding to house of Noori and they would be carrying heroin with them It is alleged that on receiving this secret information Shri Tariem Pal Inspector constituted a raiding party comprising of SIs Swatantra Kumar, Jagbir Singh,. Davinder Manchanda' Dewan Singh, Asi Hari Singh, Head Constables Jaiwant Singh, Ram Dass, Hari Ram, Manohar Lal and Constables Samey Singh, Udaibir Singh, Prem Chand, Subhash Chander and Shambhu Pershad and the raiding party Along with the secret informer came in a mini-bus being driven by driver Rajinder Singh, to the Savitri Cinema and Inspector Tarsem Pal and Inspector Baldev Singh requested four or five passers-by to join in the raid but they expressing their difficulties declined to join the raiding party and left the spot. Realizing. the shortage of time available the raiding party did not make further efforts for joining any public witnesses and proceeded to bold the Naqabandi at about 1.30 P.M. It is alleged that at about 2.15 P.M. three persons carrying bags on their shoulders came and were apprehended on being pointed out by the secret informer and their names were revealed as

(1) Waisuddin

(2) Khalil Ullah and

(3) Ahmed Khalid and those persons were given option that their search could be carried out in presence of gazetted officer or Magistrate if they so desired but on their declining Si Kanta Prasad took search of bag of the appellant while Si Jagbir

Singh took search of Khalil Ullah and Si Swatantra Kumar took Search of Ahmed Khalid. Six packets containing heroin weighing one kg each were recovered form the appellant and after taking six samples i.e. one sample from each of the packets, the packets and the samples were sealed with the seal bearing mark 'SK'. Similarly, front eight packets containing one kg heroin each were recovered from Khalil Ullah and six packets containing one kg heroin each were recovered from Ahmed Khalid and separate samples were also taken by the respective Investigating Officers from the said pickets and they were also scaled separately.

(4) The case property was produced before tb(r) Sho of the Police Station who bad put his own seals on the case property including the samples and bad got deposited the same in the Malkhana. The samples of this case were got sent to the Central Forensic Science Laboratory and the report Ex. Public Witness 6/A was received from the Cfsl with the information that the samples gave positive lest for heroin.

(5) Three separate cases were filed and I am told that all the three accused were convicted and sentenced. However, only two appeals have reached for hearing before roe and I am disposing of these two appeals.

(6) In the present case, the conviction of the appellant has been brought home by the Additional Sessions Judge on the basis of the statements of Si Jagbir Singh Public Witness 4, Si Swatantra Kumar Public Witness 6 and Si Kanta Prasad Pw 7 while other witnesses had testified regarding the facts establishing that the case property remained unhampered till it was examined by the expert of the CFSL.

(7) At the outset the learned counsel for the appellant has contended that the Inspectors Tarsem Pal and Baldev Raj who were leading the raiding party were the most important witnesses in the case yet they had not been examined. Taking resort to Section 114 of the Evidence Act, counsel for the appellant has urged that an adverse inference be drawn against the prosecution for its inability to examine the said two all important witness inasmuch as those witnesses had made efforts for joining the public witnesses without success and were also supervising the raid at the time allegedly the appellant and other two culprits were apprehended. He has made reference to Sawal Dass v. State of Bihar : 1974 CriLJ664 . In the said

case a very important witness i.e. maid servant had been kept back. The case of the prosecution was that the appellant, his father and his mother who were charged for murder of appellant's wife had pushed the wife in a room and she was raising cries which were beard by her children who were present outside and who were also uttering the words that their mother was being killed and the maid servant was also present outside in the verandah The Supreme Court held that non examination of such an important witness entitled the appellant to ask the court to give him benefit of presumption under Section 114(g) of the Evidence Act. It depends on the facts of each case to see whether such a presumption could be raised against the prosecution or not. In the present case, three witnesses of the facts have been already examined in the case. Examining more witnesses on facts would have only resulted in duplication of evidence. In the State of U .P. v. Suresh : 1982 CriLJ850 . the Supreme Court has clearly laid down that the question is not whether the prosecution should have examined some other persons as witnesses who were present at the time of occurrence but it is whether the evidence of witnesses examined who have been put forward as eye witness is acceptable or not for proving the case of the prosecution against the accused.

(8) The two Inspectors who have been withheld would have proved same facts which have been Sought to be proved by three other witnesses. So, in the present case, in my opinion no adverse inference could be raised against the prosecution by taking resort to the provisions of Section 114{g) of the Evidence Act.

(9) Counsel for the appellant has also placed reliance on Thulia Kali v. State of Tamil Nadu, : 1972 CriLJ1296 . In the said case the witnesses with whom the ornaments had been kept was not examined and there being no other evidence in respect of the aforesaid fact, the Supreme Court held that non-production of said material witness should lead the Court to draw the adverse inference against the prosecution. On facts the case is distinguishable.

(10) The learned counsel for the appellant has then contended that no sincere effort appears to have been made by the raiding party for joining independent public witnesses which were available in plenty as the raid had taken place in broad day-light near a cinema which is frequented by member of the public at all

hours. It is to be remembered that the secret information bad been received about the culprits to be available at that particular place near Savitri Cinema only two hours before they were actually apprehended. The police was anxious to first organise the raiding party and to go to the spot. The police party came to the spot and an effort was made to join three or four public witnesses but without success. The police could not have taken the risk of wasting more time in making a effort to request some other persons to join the witnesses because the culprit could have arrived at the spot at any time. If in making more efforts in joining public witnesses a commotion had been raised the same would have thwarted the very purpose of organising the Nakabandi as the prospective culprits might have become aware of such a Nakabandi and might have not appeared on. the scene. Non- joining of public witnesses pots the court on its guard to examine the statements of the prosecution witnesses with bit more care and caution. In the present case, the Additional Sessions Judge has closely scrutinized the statements of the said witnesses and has come to the conclusion that case against the appellant stood established beyond any shadow of reasonable doubt. I have been taken trough the statements of all the witnesses by the learned counsel for the appellant and I must say that nothing has come out in their statements to throw any doubt regarding their trustworthiness. After all in cross-examination it is not even suggested that these police officers bad any reason to falsely implicate the appellant and the other two culprits and foist such huge recoveries of prohibited drug on them. It has been argued before me by the learned counsel for the appellant that in fact, Noori bad been apprehended by the police and the appellant and the other two culprits bad been made only scapegoats by the police and Noori had been allowed to go spot free. Nothing has been elicited from the police officers which could show that they could have any motive to allow the real culprit to escape and falsely implicate the appellant and the other two culprits After all if the said recovery had been effected from Noori or from Noori's house, there is to earthly reason why the police officers would have allowed Noori to escape the clutches of law No serious discrepancies in the statements of the witnesses have appeared which could even throw any slightest doubt regarding truthfulness of the case of the prosecution. The learned counsel for the appellant has pointed out that Rukkas framed in the three cases were exactly worded. If that is so, I do not

understand how it could shake the prosecution case. Three culprits had been apprehended together and proceedings had been carried out at the same time, so the feats in the three cases have to be incorporated in a similar manner. .

(11) The learned counsel for the appellant has then contended that the sampling has been done in the three cases simultaneously with one police officer weighing the heroin and the other patting the samples and there could have arisen a possibility of inter-mixing of heroin recovered from one culprit with the heroin recovered from the other culprits inasmuch as one seal bad been used in all the three cases. Counsel for the appellant forgets that there were three Investigating Officers dealing separately with the three culprits and there could not have arisen any occasion for inter-mixing the case property of one culprit with the case property of other culprits.

(12) The learned counsel for the appellant has then pointed out that Constable Risal Singh Public Witness 3 had taken the case property of the three cases together and had produced the same before Sho Lakhminder Singh Public Witness 1 and thereafter Lakhminder Singh bad put his seals on the case properties and deposited the same in the Malkhana yet Public Witness 1 Lakhminder Singh contradicted Risal Singh by deposing that the case property of one case was produced first and thereafter the case property of other two cases were produced one after the other and he could not give the names of the constables who produced the case properties of other two cases. It appears that due to lapse of time Public Witness 1 Lakhminder Singh had forgotten the details as to whether the cage property of these three cases was brought by the one constable together or not. It is pertinent to mention that he admits that he had put his seal on the case properties and got them deposited in the Malkhana So, it cannot be said that any serious discrepancy had appeared in the case of the prosecution with little variances coming in the testimony of Public Witness 1 on this score Public Witness 2 Head Constable M.S. Patwal, who was working ay Duty Officer, categorically deposed that Risal Singh had brought the Rukkas of three cases on that day on the basis of which be registered three FIRs.

(13) The learned counsel for the appellant has raised another contention that the report of the Cfsl in the present case is not clear as to details regarding the heroin present in the samples. I have not been able to appreciate the contention. The Cfsl report clearly shows that the samples gave positive test for heroin. No request has been made by the appellant for summoning the expert who gave the report for purposes of cross-examination. The contents of the Cfsl report have to be taken a correct. So, it must be held that heroin was recovered from the appellant.

(14) It was then urged th.u there has appeared discrepancy in the statements of Risal Singh and the Investigating Officer whereas the Investigating Officer has stated that after Risal Singh came back after depositing the cage property he has again sent back with the recoveries effected from personal search of the culprits whereas Risal Singh does not say so It appears from the statement of Risal Singh that his attention was not invited to this particular aspect. So, it cannot be said that there has appeared any contradiction in the statements of the said witnesses on this aspect of the case. At any rate, the same does not go to the root of the prosecution case. The learned counsel for the appellant has contended that it was the requirement of Section 55 of the Ndps Act that the samples of the case property ought to have been taken in presence of the Sho and as it was not done in the present case the mandatory provision contained in the said Section stood violated. Similar contention was raised before me in Criminal Appeal No. 12/89, David R. Hall State, decided on March 19, 1990 and I had given the interpretation that Section 55 does not contemplate that the samples cannot be taken by the Investigating Officer at the spot, It was held that if any sample is to be taken after the case property is deposited with the Sho, then the same shall be taken in the presence of the SHO. So, I need not gay anything more on this point.

(15) Lastly, the learned counsel for the appellant has vehemently argued that the affidavit filed by Constable Prem Chand to prove that he bad taken the samples from the Malkhana and delivered the same intact at the office of the Cpsl being not in accordance with the law, the prosecution has thus filed to prove that the case property remained unhampered from the date the same was seized till the sample was analysed by the expert of the CFSL. He has cited State of Rajasthan v. Daulat Rom. : 1980 CriLJ929 , in which the Supreme Court has held that where the

samples of opium changed several hands before reaching the public analyst and yet none of those in whose custody the samples remained were examined by the prosecution to prove that while in their custody the seals on the samples were not tampered with, the inevitable effect of the omission was that the prosecution failed to rule out the possibility of the samples being changed or tampered with during the period in question. In the said case an application had been moved under Section 540 of the old Code of Criminal Procedure for examining the said persons to establish the whole link. The Supreme Court held that onus is on the prosecution to prove the entire case at the trial and the prosecution could not be allowed to fill up the gaps or lacunae left at the trial. There is no dispute about the legal proposition of law that the onus is on the prosecution to establish that the case property remained unhampered at all times and at all stages.

(16) Counsel for the appellant has cited State of Punjab v. Partap Singh, 1978 C.L.R. (Punjab & Haryana) 83 In the said case, the affidavits of formal witnesses had been tendered in evidence but the said affidavit did not meet the requirements contained in rule 11 and rule 12 in Volume Iv, Chapter 12-D of the High Court Rules & Orders and thus, it was held that the said affidavits could not be read in evidence. Rule 11 requires that if a person making an affidavit is not personally known to the Magistrate then the magistrate has to specify at the foot of the affidavit the discription of the person by whom the identification had been made. Rule 12 requires the Magistrate to append a certificate at the foot of the affidavit to the effect that such affidavit has been made before him In the said case, the word 'attested' was written by the Magistrate. The Division Bench of the Punjab & Haryana High Court held that such attestation is not proper So, it was held that the prosecution failed to prove that the case property remained unhampered.

(17) Section 296 of the Code of Criminal Procedure allows the affidavit of a formal witness to be produced during the trial. It is not disputed that evidence of Prem Chand Constable was of formal nature. The affidavit of Constable Prem Chand is reproduced below for the sake of facility :

'TO be Presented in the Court of Shri V.B. Bansal, ADSJ.Patiala House, New Delhi. Affidavit I, Constable Prem Chand No. 303/Crime, solemnly affirm and state

that I am a witness in case Fir No. 1418 dated 23-12-85 U/s 21/61/85 N.D.& PS.Act, 1985, P.S. Kalkaji. Delhi and that I took six samples of heroin sealed with the seal of S.K. & L.S B. in the above noted case from the Mhc (M) P.S. Kalkaji, Delhi on 3-1-86 and deposited the same at Cfsl, Lodhi Complex, New Delhi, on the same day. So long the samples remained in my Custody the seals were remained intact. sd/- Prem Chand Deponent I further verify and affirm that whatever has been stated above is true to the best of my knowledge and belief and nothing has been concealed there. sd/- Deponent Attested sd/- 4/8/86 Metropolitan Magistrate Patiala House Courts, New Delhi I identify the deponent, (Seals) Rubber Stamp) sd/- S. Kumar 4-8-86'

(18) The, learned counsel for the appellant has contended that the verification of the affidavit is not in consonance with Jaw as it is not made clear as to what part of the affidavit is true to the personal knowledge of the deponent and what is believed t,o be true on the basis of the belief. However, if the contents of the affidavit as reproduced above arc kept in view, the same arc self-evident to show that the contents are based on personal knowledge of Constable Prem Chand. In a similar type of affidavit a Single Judge of Mysore High Court in Shivasharan Reddy v. State of Mysore & Others, Air 1968 Mys 119, held that the verification was not wrong when it is clear that the contents of the affidavit could be only on the basis of personal knowledge of the deponent. In the said case also, in the verification it was recorded that the contents are true to personal knowledge, information and belief. Still it was held that the verification could not be held to be defective. None of the facts mentioned in the affidavit could be based on any belief because what hai been mentioned by Constable Prem Chand is on his own act of taking the samples from the Police Station Kalkaji and delivering the same intact at the Cpsl and the samples having the seals of 'SK' and 'LSB' on them and that samples remaining in his custody in the transit and seals remaining intact. Not a single, fact is mentioned which could not be in the personal knowledge of the deponent. So. it cannot be held that the affidavit is defective on account of any wrong verification made in the affidavit. The affidavit shows that the deponent had been identified before the learned. Magistrate by the Sub Inspector and the Magistrate had attested the affidavit. The requirement of Rule Ii mentioned above appears to be well met. The word 'attest' according to Concise Oxford Dictionary

means 'testify, certify, put (person) on oath or solemn declaration, administer oath or solemn declaration, administer oath of. allegiance to, bear witness to'. The word 'attestation' means 'act of testifying, testimony, evidence, formal confirmation by signature, oath, etc., administration of an oath'. The word 'testify' means 'bear witness to fact, give evidence'. So, the word 'attested' written by the Magistrate would mean that the deponent bad been identified before him and he had administered oath to him and testimony of deponent had been incorporated in the affidavit. It was not necessary for the Magistrate to have appended any certificate that he bad read over and explained the contents of the affidavit to the deponent who admitted the same as correct. The moment the Magistrate attested the affidavit the legal inference is that he administered the oath to the deponent and also got affirmed from the deponent that whatever is stated by him in the affidavit is known to the deponent and the deponent was identified by a person known to the Magistrate.

(19) In the present case. Constable Prem Chand was recalled after the close of the prosecution evidence to enable the defense to cross-examine the witness and he was cross-examined and nothing came out from his cross- examination to suggest that any fact stated by him in his affidavit was incorrect. So, it cannot be said that the affidavit in the present case filed by Constable Prem Chand, a formal witness is in any manner defective so that it cannot be read in evidence.

(20) I, hence, hold that the conviction of the appellant was well based and does not call for interference. I maintain the conviction and the sentences of the appellant and dismiss the appeals.

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