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Court : Delhi

Decided On : Jul-27-1990

Reported in : 1991CriLJ2793

Judge : V.B. Bansal, J.

Acts : Narcotic Drugs and Psychotropic Substances Act, 1985 - Sections 42 and 50

Appeal No. : Criminal Appeal No. 53 of 1990

Appellant : Lachho Devi

Respondent : State

Advocate for Pet/Ap. : I.U. Khan and; G.S. Vashisht, Advs

Judgement :

V.B. Bansal, J.

(1) Smt. Lahho Devi has filed this appeal thereby challenging her conviction under Sec. 20(Part II) of the Narcotic Drugs & Psychotropic Substances Act, 1985 (hereinafter to be referred to as the Act) and the sentence of rigorous imprisonment for 10 years with a fine of Rs. 1,00,000 and to undergo further rigorous imprisonment for one year in case of default in the payment of fine vide judgment and order dated 24th February. 1990 of an Additional Sessions Judge,

New Delhi.

(2) Shri I. U. Khan appearing for the appellant has submitted that there has been non-compliance of the. mandatory provisions of the Act and there are numerous material discrepancies in the statements of the witnesses. He has further submitted that S.I. Gurdial Singh was inimical towards the appellant and was in search of an occasion to falsely implicate the appellant in a case and immediately on getting such an occasion while officiating as S.H.O. he managed to implicate the appellant in a serious offence. He has also submitted that the prosecution was unable to bring home guilt against the appellant beyond reasonable doubt on account of which she is entitled to be acquitted.

(3) Before discussing the arguments it would be appropriate to give detailed facts of the prosecution story.

(4) On 26th December, 1987 while working as S.H.O. Police Station Hazrat Nizamuddin S. I. Gurdial Singh accompanied by S. I. Jaldhari Lal and other police officials was present near Khusro Park Mizamuddin. He received a secret information at about 6.00 P.M. that a lady named Lachho Devi would be coming to Basti Nizamuddin via Khusro Park having Charas for sale. Accordingly a raiding party was organized by S. I. Gurdial Singh in which besides the police officials already present with him lady constables Anita and Vinod and two public witnesses Ikram Ahmed and Mohd. Hussain were joined. A Nakabandi was held and at about 6.45 P.M. Smt. Lachho Devi was apprehended at the pointing out of the informer.

(5) S. 1. Gurdial Singh informed Smt. Lachho Devi about his suspicion of her having Charas and that she could be produced before A.C.P. or Gazetted Officer for the purpose of taking her search. She, however, refused to go to the Gazetted Officer and offered to be searched at the same place. Accordingly lady constables Anita and Vinod on search recovered two packets wrapped in a polythene from inside her blouse which on checking were found to contain Charas. The contents on weighing were found to be 500 gms. of Charas each. Fifty gram was separated from each packet and thereafter the two samples and the remaining Charas were sealed in three parcels sealed with the seal of 'J.L.' These parcels were also

sealed by S. I. Gurdial Singh Sho with his own seal 'G.S.'. The seals after use were handed over to Mohd. Hussain witness. Cfsl form was also filled up and the parcels were taken into possession vide seizure memo.

(6) A rukka was sent to the police station by S.I Gurdial Singh on the basis of which Fir No. 313 was recorded and the investigation was entrusted to S. I. Jaldhari Lal.

(7) The Investigating Officer recorded the statement of the witnesses and arrested the accused. The case property was deposited with Moharrar Malkhana. The samples were sent to Cfsl wherefrom a report was received that the samples gave positive test for Charas The accused by keeping her possession Charas i's stated to have committed the offence and so was challaned.

(8) Eight witnesses were examined by the prosecution. The accused when examined under Sec. 313 denied the allegations about the recovery of Charas or taking of the proceedings in respect of the said recovery and claimed that she has falsely been implicated. It was also pleaded by the appellant that S. I. Gurdial Singh had misbehaved with her on account of which she slapped him and on account of this incident S.I. Gurdial Singh got her falsely implicated in this case. She examined three witnesses in her defense. The learned trial court after hearing arguments convicted and sentenced the appellant vide impugned judgment and order.

(9) First submission of learned counsel for the appellant has been that there has been a material error in the charge framed against the appellant on account of which here has been failure of justice resulting in causing prejudice to her rights. According to the prosecution story this incident took place on 26-12-1987. However, in the charge framed on ?l-5-1988 the date of incident has been mentioned as 26-11-1987. This very mistake has been repeated while putting question no. 1 to the appellant at the time of recording her statement under Sec. 313 Cr. P.C. According to the learned counsel for the appellant Smt. Lachho Dev has been misled with regard to date of incident and so has been prejudiced in her right of defense. The argument appears to be attractive but without any force. A perusal of the file shows that all the witnesses have mentioned the date of incident

as 26-12-1987 and even in other questions put to the appellant while recording her statement the correct date of incident has been mentioned.

(10) Section 464 of the Code of Criminal Procedure provides that no finding, sentence or order by a Court of competent jurisdiction shall be deemed invalid merely on account of any error or irregularity in the charge unless the Court is of the opinion that such a defect has resulted in failure of justice. When specifically asked counsel for the appellant was unable to point out how there was failure of justice merely on account of the mentioning of this wrong date which appears to be a typographical mistake.

(11) Learned counsel for the appellant has submitted that no independent witness was joined in the raiding party by S. I. Gurdial Same in spite of his having received prior secret information and only interested persons with shady character were taken along with him. In this way he has submitted that S. I. Guraial Singh has not acted in an impartial manner. I find no force in this submission. It has clearly been stated by S. I. Guraial Singh (Public Witness 6) that on getting secret information Mohd. Hussain and Ikram Ahmed were joined from near the place of getting secret information, Ikram Ahmed (Public Witness 1) has clearly stated that he has not started appearing as a witness of the police and that he was once arrested under Sec. 107/151 Cr. P.C. in 1979 on account of a quarrel with his father and in the same year he along with 17 persons was arrested in a false case. Mohd Hussaim (Public Witness 2) has denied that nothing was recovered from the appellant or that he was making false statement. There is no doubt that S.I. Gurdial Singh (Public Witness 6) has slated that he did not remember in how many cases investigated by him these public witnesses had been joined. However, Ikram Ahmed has clearly stated that he has not started appearing as a witness for the public and no such question was put to Mohd. Hussain. In these circumstances, I find no material on record for coming to the conclusion that these two persons from the public were not independent witnesses or that they were in any way interest in the police. There is no allegation from the side of the appellant (hat these two witnesses were in any way inimical towards her.

(12) Learned counsel for the appellant has submitted that there has been a non-compliance of the mandatory provision of making the appellant aware that she had a choice of being searched in the presence of a Gazetted Officer or a Magistrate. He has also submitted that merely by informing the appellant that she could be searched in the presence of A.C.P. could not be taken to the compliance of the provision and the appellant could never be aware as to whether A C.P. is a Gazetted Officer or not. He has, thus, submitted that the appellant has been derived of very valuable right on account of which she is entitled to be acquitted. I have given my thoughtful consideration to this submission in the light of the evidence on record but find that as a matter of fact there has not been any violation of this mandatory provision.

(13) The case of the prosecution as contained in rukka Ext. pw6/A has been that the annulling after being apprehended was informer that she could he taken before, a Gazetted Officer or A.C.P. but she declined. According to Ikram Ahmed (Public Witness 1) the appellant after being apprehended was told that she could be taken to A.CP. or senior officer could be cane,d to take her search but this offer was dclined. Public Witness 3 lady Constable Anita has claimed that after she was apprehended an enquiry was made from the appellant if a Gazetted Officer or A.C.P.be called but she declined. According to S.I. Gurdial Singh accused was told that her search could be taken in the presence of a Gazetted Officer while according to S.I. Jaldhari Lal (Public Witness 7) she was told that it she wanted a Gazetted Officer or A.C.P. defense Colony could be called to be a witness of her search but she declined. There is no doubt that the witnesses have not claimed that the appellant was informed that even a magistrate could be called for being presence at the time of her search but this cannot be considered to be a fact to be taken as violating the mandatory provision contained in Sec. 50 of the Act. The purpose of informing a suspect that the search could be taken' in the presence of a Gazetted Officer was to ensure that there was a safeguard against planting any incriminating article. The appellant having declined the offer of being searched in the presence of a Gazetted Officer it cannot be said that there was any violation of the mandatory porovision. May be that she was not aware as to whether Acp was a Gazetted Officer or not but as is clear from the prosecution witnesses she was made fully aware of her right to be search in the presence of a Gazetted Officer

which offer she did not accept.

(14) Another submission of learned counsel for the appellant has been that there ha'? been a violation of the mandatory provision contained in Sec. 42 of the Act inasmuch the Investigating Officer in spite of his having prior information did not reduce to writing the secret information nor had he sent the same to senior officers. He has, thus, submitted that on account of this failure of the Investigating Officer the appellant is entitled to accluittal. I have given my thoughtful consideration to the submission but have not been able to agree with the same. According to the prosecution story the secret information available with the S. I. Gurdial Singh was that one lady Lachho Devi would be coming having Charas with her and so a raiding Park. In these circumstances. I am of the considered view that the present case would be govern med by Sec. 43 and not by Sec. 42 of the Act. There was no obligation on the part of the Investigating Officer to reduce to written the secret information prior to the raid being organized and so no adverse inference can be drawn against the prosecution on account of the Investigating Officer having not done so.

(15) Learned counsel for the appellant has submitted that there have been material discrepancies in the statements of the witnesses on the point as to from which direction the appellant came and who had effected the recovery. Before discussing the evidence on the point it is important to mention that this incident is of 27th December, 1987. Public witnesses Ikram Ahme,d and Mohd. Hussain were examined on 5th December, 1988, lady Constable M/s. Anita was examined on 21st January 1989 and the other witnesses were examined about two years after this occurrence.

(16) According to the prosecution story Smt. Lachho Devi appellant was apprehended while going towards Basti Nizamuddin from Khusro Park S. I. Jaldhari Lal (Public Witness 7) has claimed that the accused came from the side of Khusro Park and going towards Basti Nizamuddin while according to S. I. Gurdial Singh she was apprehended near Khusro Park. Accordin'g to lady Constable Anita Lachho Devi came from the side of Nizamuddin towards Khusro Park, Lady Constable Vino (Public Witness 8) has stated that the accused came from the side

of Khusro Park towards Nizammuddin. Ikram Ahmed has claimed that the accused came from the side of the park. All these witnesses are unanimous in ther statements that the appellant was apprehended near Khusro Park at about 6.45 P.M. Taking the statements of these witnesses as a whole I find no material discrepancy in their statements and such types of discrepancies are bound to occur in the testimony of the witness examined after a long gap.

(17) I do not find any force in the submission of Learned counsel for the appellant that there is any material discrepancy in the statements of the witnesses with regard to the recovery. The case of the prosecution has been that the accused was searched by the two lady constables. According to S. I. Gurdial Singh lady constable Miss. Anita and another lady constable took search of the accused and two packets were recovered from inside the blouse of the accused which contained Charas; S. I. Jaldhari Lal (Public Witness 7) has stated that. two lady constables took the accused 3 or 4 places away when constable Anita stood nearby while lady constable Vinod took search of the accused and recovered two packets from inside her blouse she was wearing and the packets contained Charas. Constable Ms. Anita (PW 3) has claimed that she on search recovered a polythene packet from inside the blouse of the accused which constrained two packets of Charas while lady constable Vinod (Public Witness 8) has stated that she and lady constable Anita took search of the accused and recovered two packets of Charas from her blouse. Ikram Ahmed (Public Witness 1) has claimed that the accused took out two packets from her blouse before the lady constables. These statements when read together do not make out any material discrepancy so as to hold that they were not reliable witnesses.

(18) According to the prosecution the secret information was received by S. I. Gurdial Singh at 6.00 P.M. who organized a raiding party and the two lady constables were brought to the spot from Police Station Haus Khas by S. I. Jaldhari Lal. Two independent witnesses have also been joined from the spot. In these circumstances. It cannot be said that there was any lapse on the part of the Investigating Officer in taking adequate steps to Join persons from the public and lady constables on account of the secret information being against the lady. The official witnesses have fully supported the prosecution with regard to the recovery

of two packets which on weight were found to contain 500 grams each and about the taking of samples and fixing seal on them. lkram Ahmed (Public Witness 1) has also supported the prosecution story. During his examination-in-chief he was not sure about the number of sealed parcels prepared at the soot but offbeing cross-examined by the Additional P. P. he deposed that three sealed parcels were prepared at the spot. Learned counsel for the appellant has not been able to point out any material discrepancy in his statement so as to hold that he was an unreliable witness. There is no doubt that Mohd. Hussain (PW 2) has not fully supported the prosecution story. According to him recovery was effected at the spot but further proceedings were taken at the police station. According to him Lachho Devi appellant was not apprehended in his presence and he found her with the police near Khusro Park. He has been allowed to be cross-examined by the Additional P. P. on his request. The law is well retried that the version put forward by a hostile witness cannot be considered to be the version of the prosecution. It is also well settled that the testimony of a witness is not to be discarded in toto merely on account of he having been cross examined by the prosecution. Both the sides cart place reliance upon the testimony of all such witnesses. Considering the statements of all the witnesses I find that this witness corroborates the prosecution story about the recovery of two packets from Smt. Lachoo Devi.

(19) Learned counsel for the appellant has submitted that in order to succeed in proving that the article recovered from the appellant was Charas it was incumbent upon the prosecution to prove by cogent evidence proving all the links that the case property was not tampered with by any one till the samples were deposited in the Cfsl for analysis and that the prosecution has failed in proving the link. I have given my thoughtful consideration to this submission and have carefully examined the record. I find substance in this submission.

(20) According to the prosecution story 50 gms. was taken out from the two packets by way of sample and thereafter the two samples and the remaining contents of the packets were converted into separate parcels sealed with the seal of 'J.L'.. These were also sealed with the seal of 'G.S.' being of S.I. Gurdial Singh who was at that time working as SHO. These were taken into possession by S. I.

Gurdal Singh who thereafter transferred the investigation of the case to S. I. Jaldhari Lal.

(21) Rukka Ext. Public Witness 6! A does to indicate that it was accompanied by the sealed parcels when sent to the police station for the registration of a case. Head Constable Lal Singh (Public Witness 4) was working as Moharrar Malkhana P. S. Nizamuddin at the relevant time. He has claimed that the three parcels sealed with the sales of 'J.L. and 'G.S.' were deposited with him by S. I. Gurdial Singh relating to this case and that on 6th January 1988 the two sample scaled parcels were sent by him to Cfsl through constable Kishan Pal. He has claimed that no one tempered with the sealed parcels during the period they remained in his custody. S. J. Jaldhar Lal (Public Witness 7) has also claimed that the case property was deposited with Moharrar Malkanna by the Sho However. Sho S.T. Gurdial Singh (PW6) is silent about his having deposited the case property with Moharrar Malkhana or that it was not tempered with by any one during the period he was possession of the same. Constable Kishan Pal Singh (Public Witness 5) has claimed that on 6th January 1988 he bad taken two parcles bearing seals of 'J.L.' and 'G.S.' from Malkhana Moharrar and delivered the same at Cfsl the same day. According to him he had also taken along with him Cfsl form bearing the specimen seal and that the Cfsl form was deposited in the Malkhana of the police station along with the parcels. It is pertinent to note that neither Sho S.I. Gurdial Singh (Public Witness 6) nor Moharrar Malkhana H. C. lal Singh (Public Witness 4) have stated that the Cfsl form was deposited with Moharrar Malkhana along with the sealed parcels. Constable Kishan Pal Singh has nowhere claimed that the case property was deposed in the Malkhana in his presence and in these circumstances his statement cannot be of any help to the prosecution, it is also to be noted that according to the prosecution story the parcels were sealed with the seals of J. L.' and 'G.S.'. According to constable Kishari Pal Singh (Public Witness 5) the sample sealed parcels were sealed with the seals of 'H.L.' and 'G.S.'. According to the prosecution story the seals after use were handed over to Mohd. Hussain (Public Witness 2). In his testimony it has been claimed by Mohd. Hussain (Public Witness 2) that the seals were returned by him to the police the same day at. the same place. The statement of Mohd. Hussain remains unchallenged and it has not been challenged by the prosecution. None of the

official witnesses has claimed that the seal was not returned to the police by Mohd. Hussain (Public Witness 2) at the soot at the same time. Even S. I. Gurdial Singh examined much later has not chose to contradict Mohd. Hussain in his claim about the return of the seals at the spot. It is, thus. possible and probable that may be that the seals were available with S.T. Gurdial Singh even before the sealed parcels were deposited with Moharrar Malkhana, The link evidence is missing to the effect that the sealed parcels were not tempered with by any one before they were deposited in the Malkhana. There is also no cogent reliable evidence on record that the Cfsl form was also deposited with Moharrar Malkhana and it also remained in his custody till it was sent with the samples to CFSL.

(22) I have perused relevant copies of the Malkhana register and there is no mention about the deposit of the Cfsl form with Moharrar Malkhana. In the circumstances, I am clearly of the view that the prosecution has failed to prove this link evidence to show that the sample parcels were not temper with by any one before they were examined inthe CFSL. On this account the appellant is entitled to benefit of doubt.

(23) In view of my aforesaid discussion. I hold that the prosecution has not been able to prove beyond doubt on record that the recovery effected from the appellant was of Charas and so she is entitled to acquittal.

(24) As a result, the appeal is accepted. Conviction and sentence of the appellant are set aside and giving her the benefit of doubt Lachho Devi is acquitted. She shall be released forth- with if not required in any other case.

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