

Mahmood Vs. State

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Court : Delhi

Decided On : Apr-09-1991

Reported in : 1991(2)Crimes686; 44(1991)DLT229; 1991RLR287

Judge : S.C. Jain, J.

Acts : [Narcotic Drugs and Psychotropic Substances Act, 1985](#) - Sections 18

Appeal No. : Criminal Appeal No. 86 of 1990

Appellant : Mahmood

Respondent : State

Advocate for Pet/Ap. : Rebecca Mamman, Adv

Judgement :

S.C. Jain, J.

(1) Facts giving rise to this appeal are that on 2.3.88, at about 4 p.m , a police party consisting of police officials of Police Station Chandni Mahal headed by Asi Om Parkash were on patrol duty in the area. Asi Om Parkash is stated to have a secret information that a person having large quantity of opium would come from the side of Chitli Kabar Chowk. This information was conveyed to Si P.P. Singh and it was reduced into writing. The raiding party of the police personnel Was formed and one passerby Purshottam Kumar Batra was also joined. Some nearby

shopkeepers were asked to join the raiding party but they declined. The raiding party formed a picket at the corner of Gali Chamar Wali and Chitii Kabar. At 4.20 p.m the appellant was seen coming carrying a paper bag in his hand and he was accosted by the police party at the pointing of the informer. The appellant was informed of the information against him and the intention to search him. He was told that if he wished to be searched in the presence of a gazetted officer or a magistrate, it can be arranged but the appellant declined the offer. Asi Om Parkash (Public Witness 7) took search of the appellant and the paper bag being carried by the appellant was found to contain opium which on weighment was found 1 kg 50 grams. In the meantime Sho, Inspector R.K. Sharma arrived at the spot and he was apprised of the situation and a sample of 20 grams of opium was separated from the rest of the opium and they were separately sealed and packed in his presence with his seal and the seal of Asi Om Parkash. Cfls form was filled and specimen seals were affixed thereon. Seal of Asi after use was handed over to the public witness. Rukka was sent to the police station and a case under Section 18 Ndps Act was registered against the appellant. The case property and the sample were deposited in the malkhana under the directions of the SHO. On receipt of report from Cfsl .it was revealed that it was opium. The accused was charged for an offence punishable under Section 18 of the Ndps Act to which he pleaded not guilty. During trial the prosecution examined as many as seven witnesses in support of its version. In defense the appellant took the plea that he was innocent and he was falsely implicated in this case. He is a bad character of the area. He was falsely implicated in this case by calling him to the police station. The public witness is known to the police and is a scooter dealer in Darya Ganj. The police officials are interested witnesses and they have deposed falsely.

(2) Upon trial the learned Addl Sessions Judge convicted him for the said offence and sentenced him to undergo Ri for ten years and to pay a fine of of Rs. 1 lakh and to further undergo rigorous imprisonment for one year.

(3) Aggrieved, the appellant has filed this appeal. As the appellant was not represented by any counsel. Miss Rebecca Mamman advocate was appointed amices curiae to assist the Court in this appeal.

(4) Ms. Rebbeca, learned counsel for the appellant, drew my attention towards the statement of the prosecution witnesses to point out the contradictions therein. Purshottam Kumar Batra (Public Witness 4) stated that the appellant was coming from Gali Chamar Wali, whereas Asi Mahinder Singh (Public Witness 5) and Asi Om Parkash (Public Witness 7) stated that the appellant was seen coming from Chitii Kabar and proceeded to Gali Chamar Wali. One witness stated that he was coming out of the said lane while the other stated that he was about to enter the said lane. According to her, the said statements are totally opposed to each other and this cannot be said to be contradiction of a minor nature.

(5) She further pointed out that, Public Witness 4 stated that at the time of his arrest the appellant was wearing white kurta and pyjama, whereas Mahinder Singh (Public Witness 5) stated that he was wearing a shirt and pant. She submitted that contradiction of this types is important and significant. If the witness is present at that time he can hardly confuse such facts. She also pointed out that the prosecution version is that the police patrol party had received secret information and he was arrested on the pointing out of the informer. PW4 on a specific query stated that apart from him and the police personnel there was no other person present at that time indicating that the appellant was not arrested on the pointing out of the informer. She further pointed out that Public Witness 5 stated that after the apprehension of the appellant a constable was sent to call the Sho to the spot, whereas both the 10 PW7 and Mahinder Singh PW5 stated that Sho came of his own and no message was sent to him. She also drew my attention to the statement of PW2 Sho, Inspector R.K. SHARMA. He stated that when he went to the spot, a chair was brought for him to sit down, whereas PW5 Mahinder Singh stated that the Sho kept sitting in his jeep during the proceedings. This is again a significant contradiction and cannot be brushed aside as a minor lapse. According to the learned counsel, the prosecution story is manifestly false and concocted. From the nature of contradictions in the statements it can be observed that the appellant was not arrested in the manner claimed by the police, nor any public witness was present, Thus no opium could be said to have been recovered from him. According to her the contradiction in the statements of the witnesses as pointed out are not of the nature that can be termed as lapse or variation., They are of the kind which question the very occurrence. According to her, the evidence

is not consistent, cohesive or compatible. It does not inspire confidence and smacks of fabrication. Contradictory testimony of the witnesses examined abundantly demonstrate that the version of the police is just not true. The appellant was not arrested at the spot as claimed, nor circumstances related in respect of the proceedings at the spot are true. Thus, the Explanationn given by the appellant that he was summoned to the police station as it is usual for persons who are involved in criminal cases when this case was made out against him. According to the learned counsel it is unfortunate that Ndps Act can be often misused as a tool of oppression.

(6) She also pointed out that the prosecution has not made compliance of the mandatory provisions under the Ndps Act inasmuch as no notice under Section 50 of the Ndps Act was served upon the appellant. She pointed out that Sections 41, 43, 44, 50, 51, and 55 have been held to be mandatory and contravention thereof vitiates the investigation and the trial. Reliance has been placed on a decision Bhajan Singh v. State 1988 (1) Cri 444. She also pointed out that before making a search the officer or other persons are required to call two or more witnesses which is not an idle formality. Reliance has been placed on the decision of this Court in Sunari @ Chamari v. State : 34(1988)DLT124 .

(7) I have given my considered thought to the submissions made by the learned counsel for the appellant and gone through the record It is settled principle of law that while appreciating evidence of a witness the approach must be whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is formed, it is undoubtedly necessary for the Court to scrutinise the evidence more particularly keeping in view the deficiencies, drawbacks, and infirmities pointed out in the evidence as a whole, and evaluate them to find out whether it is against the general tenor of the evidence given by the witness and whether earlier evaluation of the evidence is shaken as to render it unworthy of belief. Minor discrepancies on trivial matters not touching the core of the case, by per technical approach by taking sentences torn out of context here and there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the root of the matter, .would not ordinarily permit rejection of the evidence as a whole. If the Court before whom the witness gives

evidence had the opportunity to form the opinion about the general tenor of evidence given by the witness, the appellate Court which had not this benefit will have to attach due weight to the appreciation of evidence by the trial Court and unless there are reasons weighty and formidable it would not be proper to reject the evidence on the ground of minor variations or infirmities in the matter of trivial details. Even the honest and truthful witness may differ in some details unrelated to the main incident because power of observation, retention and reproduction differ with individuals. Discrepancies which do not go to the root of the matter and shake the basic version of the witnesses, therefore, cannot be annexed with undue importance. The Supreme Court in the case of *State of Punjab v. Wassan Singh* : 1981 CriLJ410 :

'WHERE the witnesses are examined at the trial, 17 months after the incident, such discrepancies in regard to collateral or subsidiary facts or matters of detail occur even in the statements of truthful witnesses, particularly when they are examined to depose to events which happened long before their examination. Such discrepancies are hardly a ground to reject the evidence of the witnesses when there is general agreement and consistency in regard to the substratum of the prosecution case'.

(8) The prosecution evidence may suffer from inconsistencies here and discrepancies there but that is a shortcoming from which no criminal case is free. The main thing to be seen is whether those inconsistencies go to the root of the matter or pertain to insignificant aspects thereof. In the former case, the defense may be justified in seeking advantage of the inconsistencies in the evidence. In the latter, however, no such benefit may be available to it. That is a salutary method of appreciation of evidence in criminal cases, as has been laid down by the Supreme Court in *Krishna Piliai Sree Kumar v. State of Kerala* : AIR 1981 SC1237 . In the deposition of witnesses there are always normal discrepancies, however, honest and truthful they may be. These discrepancies are due to normal errors of observation, normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of occurrence and the like.

(9) Keeping in view these principles of law regarding appreciation of evidence, I find that the contradictions pointed out by the learned counsel for the appellant in the present case are minor contradictions which do not go to the root of the matter. The statements of all the witnesses including the Statement of the public witness Shri Purshottam Kumar Batra (Public Witness 4) are corroborative on the point of apprehension of the appellant, giving him an opportunity of being searched either before a gazetted officer or a magistrate, recovery of 1 kg 50 grams of opium, taking out sample of 20 grams, sealing of the sample as well as the remaining opium, filling of the CfsI form, arrival of the Sho at the spot, putting the seal of the Sho on the parcels and CfsI form, deposit of the parcels in the malkhana, etc. The contention of the counsel for the appellant that the contradictions go to the root of the matter is not acceptable in the facts and circumstances of this case.

(10) Regarding non fulfillment of mandatory provisions of Ndps Act doubt, it is true that the provisions of Sections 41, 42, 43, 50, 51 and 55 of the Ndps Act are mandatory and contravention of these provisions vitiates the investigation and the trial, but in this case the record shows that there is no violation of any of these provisions. The version given by the witnesses that the appellant was informed about the information against him and the intention to search him and that he was told if he wished to be searched before a gazetted officer or a magistrate, the appellant declined the offer, has not been shattered in the cross-examination of the prosecution's witnesses. It is compliance of Section 50 of the Ndps Act. Section 42 does not come in the picture in this case, as he was apprehended and searched at a public place on the receipt of a secret information a few minutes before his apprehension. Section 43 which is applicable has been duly complied with. From the statements of the witnesses, it is apparent that compliance of the provisions under the Ndps Act has been made. Time was so short that when the secret information was received, the raiding party was organized in a hurry and even then in such a short time, the prosecution included one public witness Purshottam Kumar Batra (Public Witness 4) and there is no reason to discard his testimony. There is nothing on record to show or even to indicate that he has any reason to depose against the appellant or that he is inimical towards the appellant.

(11) The learned Addl Sessions Judge has correctly appreciated the facts and law while convicting the appellant for the said offence under Section 18 of the Ndps Act and I confirm his findings.

(12) On the point of sentence also. the recovery of opium is quite heavy i.e.3kgs. The minimum sentence provided for such an offence is 10 years rigorous imprisonment and a fine of Rs. 1 lakh which may extend to 20 years rigorous imprisonment and a fine of Rs. 2 lakhs. The trial Court has awarded the minimum sentence of ten years rigorous imprisonment and a fine of Rs. 1 lakh. In view of the minimum sentence of imprisonment and fine prescribed under the Ndps Act, no discretion is left to the trial Court to impose a lesser sentence of imprisonment or fine in any case whatsoever, irrespective of the quantum of recovery.

(13) Under these circumstances, I also confirm the finding of the trial Court on the point of sentence. As a result, this appeal is dismissed.

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