

Gulam Mohd. Vs. State

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Court : Delhi

Decided On : Mar-01-1996

Reported in : 1996IIAD(Delhi)150; 1996(3)Crimes272; 1996(37)DRJ32

Judge : Usha Mehra, J.

Acts : [Narcotic Drugs and Psychotropic Substances Act, 1985](#) - Sections 55

Appeal No. : Criminal Appeal No. 231 of 1994

Appellant : Gulam Mohd.

Respondent : State

Advocate for Pet/Ap. : Mukesh Kalia and; H.J.S. Ahluwalia, Advs

Judgement :

Usha Mehra, J.

(1) On secret information being received by Sub Inspector Om Prakash that a person who is in possession of Charas would be coming from the Railway Station side towards Chandni Chowk, S.I. Shri Om Prakash organized a raiding party consisting of Constable Kaushal Singh and Manmohan. They were on patrolling duty in the area near Jubilee Cinema Along with A.S.I. Sharan Chand on 17th September, 1988. Mr. Suresh Kumar an independent person was also made member of the raiding party. Nakabandi was made near Jubilee Cinema. On the

pointing of informer, the appellant was stopped. He was asked whether he would like to be searched before the Gazetted Officer or a Magistrate. Notice under Section 50 of the Act was served on him, but he declined to get searched before either. Thereafter the formalities were completed namely sending of Rukka, weighing the smack and then converting it into the Pulandas, separating the smack for the purpose of sample and sealing the same. CfsI form was filled up and facsimile of the seal was affixed on it. The case property Along with sample were deposited with Moharar Malkhana. Thereafter sample was taken by Constable Dalbir Singh to the office of CFSL. On the report being received the challan was filed.

(2) Six witnesses were examined by the prosecution. After analysing their testimonies, the learned Trial Court by the impugned order dated 8th April,1994 convicted and sentenced the appellant to undergo rigorous imprisonment for ten years with fine of Rs.1 lakh in default of payment, to undergo further simple imprisonment for two years.

(3) The impugned order has been assailed primarily on the ground that Constable Kaushal Singh and independent witness Suresh Kumar have not been examined. Constable Kaushal Singh was the one who was alleged to have been sent to call the S.H.O. and took the Rukka to police station for registration of FIR.. Constable Man Mohan as per prosecution story brought the scale and weighed. But he appearing as PW-4 stated that he did not know anything about this case. He was neither declared hostile nor cross examined by the prosecutor. CfsI form was stated to have been sent through Constable Dalbir Singh. However, Dalbir Singh appearing as PW-2 no where stated that he took the CfsI form Along with the sample and deposited in the office of CFSL. Similarly, Head Constable Kallan Khan PW-1 who was Moharar Malkhana at the relevant time on 17th September, 1988 no where stated that CfsI form was deposited with him Along with sample or that the CfsI form was handed over to Dalbir Singh Along with the sample for deposit in the office of CFSL. This shows that there is a missing link in the evidence of the prosecution which casts doubt about the sample being tampered with as long it remained in the custody of the respondent. Beside the missing link there are material contradictions in the testimony of Investigating Officer and the

S.H.O. Moreover, partial offer was given as per the testimony of witnesses, hence there is a non-compliance of the statutory provisions of the Act. On the basis of these contentions, Mr. Mukesh Kalia, appearing as amicus curiae for the appellant contended that the appellant is liable to be acquitted.

(4) In order to appreciate his contention it was confronted to the counsel for the State to indicate why the independent witness Suresh Kumar was not examined thereby depriving the valuable right of the appellant. Mr. H.J.S. Ahluwalia appearing for the State contended that in para 36 of the judgment the Trial Court has given the Explanation for not examining the independent witness. Unfortunately, the reasoning given by the learned Additional Sessions Judge in para 36 of the judgment is not borne out from the record. Suresh Kumar, as per record of the Trial Court, attended the Court but his testimony was not recorded on that date. Subsequently, for the reasons best known and which have not come on the record, Investigating Officer closed the prosecution evidence on 18th March, 1994 without examining this independent witness. The observations of the learned Additional Sessions Judge are contrary to the record and hence cannot be sustained. There is no material on record to prove that this witness Suresh Kumar was not traceable, rather notices issued by the Court were served upon him and he did appear in the Court but his testimony was not recorded. On the notice issued under Section 250 Cr.P.C. the service was still awaited when the Investigating Officer closed the evidence of this witness without any reason. therefore, this part of the observation of the learned Trial Court appears to be pigmentation of his own imagination and cannot be sustained.

(5) Now turning to the point of missing link, PW-1 Head Constable Kallan Khan, who was the Moharar Malkhana at the relevant time, could not prove the deposit of the case property, sample and the CfsI form. He proved the copy of the Malkhana register as EX.PW-I/A. Reading of EX.PW-I/A is very interesting. Instead of indicating what was deposited and by whom he copied verbatim the Rukka in the register. However, in the second column of Ex.PW-1/A it is indicated that the sample was sent to the office of the CfsI on 22nd September, 1988, through constable Dalbir Singh. The incident is of 17th September, 1988 sample was sent for analysis on 22nd September, 1988. During all this period the seal

after the use remained in the custody of the police, therefore, the apprehension of the appellant that sample could have been tampered cannot be brushed aside lightly. In the second column where the dispatch of the sample is shown through Constable Dalbir Singh, it is nowhere mentioned that Along with sample Cfsi form was sent. In the absence of Cfsi form, facsimiles of the seals on the sample could not have been compared. Hence, tampering of sample can not be ruled out. Inspector M.D.Mehta appearing as PW-3 stated that seals of Op and Mdm were given to the independent witness Suresh Kumar. When these seals were taken back from the witness for that there is not a whisper. Suresh Kumar had not stepped into the witness-box to corroborate this part of the statements of Investigating Officer and that of the S.H.O. In the absence of corroboration from the independent witness regarding handing over the seals after use to him an adverse inference can be drawn. Had Suresh Kumar been produced he might not have corroborated this part of prosecution story. That is why he had not been produced. Head Constable Man Mohan as per prosecution version had brought the scale and weights. But he appearing as PW-4 categorically denied having any knowledge of this case. The denial of knowledge of this case by Constable Man Mohan shows that prosecution is not sure of its own case. Investigating Officer had given names of the members of raiding party without associating them. Hence, it would not be wrong to accept the contention of Mr.Mukesh Kalia that this case has been set up against the appellant. The case of the prosecution that Head Constable Man Mohan brought the weights and scale on which the case property and sample were weighed falls to the ground. Constable Man Mohan, PW-4 does not corroborate the case of the prosecution as indicated by S.I.Dharam Chand PW-5 and the Investigating Officer Om Prakash PW-6. It is not the case of the Inspector M.D.Mehta or for that matter S.I. Dharam Chand or the Investigating Officer Om Prakash PW-6 that the scale and weights were available with any one of them. If the scale and weights were not available then how the Investigating Officer weighed the charas and separated 100 gms charas as sample. Who had the weights and scale, nothing has been stated. With this sort of evidence having been led, we are left in the realm of imagination as to what exactly must have happened at the site. It would not be completely wrong to presume that whole exercise must have been done while sitting in the Police Station itself. Importance

of the CfsI form to prove that the sample remained intact and not tampered with has been recognized by this Court as well as by the Apex Court in umpteen number of cases. I need not reproduce all those decisions. Suffice it to say, that to prove that the sample was not tampered with the CfsI Form was an important piece of evidence. But neither the Investigating Officer nor the S.H.O. nor any other witness stated that CfsI form was deposited 14. in the Malkhana Along with the sample. Nor it was deposited in the office of the CFSL. on Hence, linking evidence to prove that the sample so long it remained with the police was not tampered with is missing. thereforee, on this ground alone the conviction is lireable to be set aside. Beside the above, I he non-production of the independent witness of who was a material witness and whom prosecution failed to produce deprived the appellatant of a fair trial. Constable Man Mohan PW-4 has not supported the case of the prosecution, moreover, giving up of Constable Kaushal Singh who had taken the Rukka to Police Station, are fatal for the prosecution case.

(6) For the reasons stated above I accept the appeal and set aside the conviction and sentence.

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