

Radha Kishan Vs. State

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SooperKanoon Citation : sooperkanoon.com/706037

Court : Delhi

Decided On : Jul-10-2000

Reported in : 2000CriLJ4090; 2000(56)DRJ619

Judge : Dalveer Bhandari, J.

Acts : [Narcotic Drugs and Psychotropic Substances Act, 1985](#) - Sections 50 and 57

Appeal No. : CrI. Appeal No. 103 of 1993

Appellant : Radha Kishan

Respondent : State

Advocate for Def. : Neelam Grover and ; Sima Gulati, Adv.

Advocate for Pet/Ap. : Tamali Wad, amices Curia

Disposition : Appeal allowed

Judgement :

Dalveer Bhandari, J.

1. This appeal is directed against the judgment of the learned Additional Sessions Judge in Sessions Case No. 1293/91 dated 17.3.1993. The brief facts which are necessary to dispose of this appeal are recapitulated as under:-

On the night of 29.12.1990, Sub-Inspector of Police Rajiv Rattan, who was posted in Police Station Town Hall was on his round Along with Constable Avtar Singh. At Kauria Bridge they met Constable Parkash Veer who also joined them in patrolling. At Kauria Bridge they received information that one person was present with poppy husk powder at Hardayal Library. A raiding party was formed. Ramesh Chander Garg, the then Station House Officer was telephonically requested to arrive at the spot. One Raju Pandey, as a public witness, was also joined in the raiding party. The members of the raiding party proceeded towards Hardayal Library and intereepled the appellant Radha Kishan, who was present at south west corner of the library and was having a plastic bag.

2. According to the prosecution the accused appellant was apprised of the fact that if he so desired, he could be produced before a Gazetted Officer or a Magistrate for conducting his search in their presence but the accused declined the proposal. A notice under Section 50 of the N.D.P.S. Act was also reduced in black and white. Reply of the accused duly signed by him was also recorded.

3. It is alleged by the prosecution that on search 17,300 kgs of poppy husk powder was recovered from the appellant. From the above said contraband material a sample weighing 200 grams was separated. The sample and the remaining poppy powder were separately packed and sealed with the seals bearing initials RRM belonging to the investigating officer and RCG belonging to the Station House Officer. According to the further story of the prosecution, the CFSL form was filled in and both (he seals after use were handed over to the public witness, Raju Pandey. The case property was seized vide recovery memo Ex. PW 2/B. The SHO look both the sealed packets and the CFSL from to the police station and deposited the same with Moharar Malkhana. The Investigating Officer prepared ruqqa Ex. PW 2/A and sent it to the police station for registration of the case through Constable Partap Singh. Head Constable Babu Lal recovered the formal FIR. The result received from the CFSL and proved on the record as Ex. PW 6/C revealed that the sample sent to the CFSL for Chemical analysis had given the positive tests for poppy powder.

4. The accused appellant was arrested and challaned for an offence under Section 15 of N.D.P.S. Act. The accused appellant stated that he was falsely implicated because of his enmity with the public witness, Raju Pandey. He also stated that the police and the public witness are hand in glove.

5. The prosecution examined six witnesses in support of its case. Head Constable Nahar Singh, PW 1 stated that he was posted as Moharar Malkhana in the Police Station Town Hall on 29-12-1990. He testified that R.C. Garg had deposited with him two sealed packets and the CFSL form bearing the seals RCS and RRM vide entry effected by this witness at Serial number 951 in register No. 19. He had sent the sample packet along with the CFSL form to the Central Forensic Science Laboratory through a Constable Pratap Singh. He proved the copy of the above said entry as EX-PW 1/A. He has also asserted that nobody had tampered with the case property until it remained in his custody. The Trial Court examined the prosecution and defense witnesses version and arrived at definite conclusion that the prosecution has been successful in proving the guilt of the accused and consequently the appellant was convicted and sentenced to 10 years rigorous imprisonment and was directed to pay a fine Rs. 1,00,000/- failing which the accused appellant shall undergo further simple imprisonment for one year.

6. This appeal was filed through Jail. This Court appointed Ms. Tamali Wad, Advocate, as amicus Curiae.

7. Learned amicus Curiae submitted that the prosecution case suffers from serious legal infirmities and lacunae and no conviction could be legitimately based on the evidence produced by the prosecution. Learned amicus Curiae has specifically drawn my attention to the notice under Section 50 of the Act. The said notice on translation reads as under:-

'You Radha Kishan S/o Rode Ram R/o Awaragard, near Old Delhi Station Company Bagh are informed through this notice that your bag carries powder of poppy husk. If you want, your search can take place before G.O. or senior officer or Magistrate...'

8. The learned Additional Sessions Judge did not correctly reproduce the contents of the notice under Section 50 of the NDPS Act. The accused appellant was given option to be searched before G.O. or Senior Officer or a Magistrate. In the notice nowhere it is mentioned that he was given an option to be searched before a Gazetted Officer. According to the learned amicus Curiae the initials G.O. are the abbreviation of the words Gazetted officer. The meaning of which is not known to a layman like the appellant, who has been described as a vagabond. He could barely write his own name. Ms. Tamali Wad, the learned amicus Curiae submitted that the requirement of Section 50 of the NDPS Act is that not only should an accused be given a notice before his personal search, he must also be made to understand and appreciate that he has a valuable right enshrined under Section 50 of the NDPS Act to be searched before a Gazetted Officer or a Magistrate. He thus, must be made to understand the import and the meaning of these words so that he is in a position to correctly exercise the option of being searched and then searched before a Gazetted Officer or a Magistrate. Any ordinary man much less a vagabond/illiterate person like the appellant is expected to be aware of the safeguard provided to the accused under the NDPS Act. Hence till it can be discerned from the contents of the notice that option as envisaged under Section 50 of the NDPS Act was given or not, and if given, in what terms and what was the option exercised by the accused, there cannot be a full compliance of the provision of Section 50 unless the abbreviations mentioned in the notice have been explained to the accused and he was made to understand the true contents and import of the same.

9. Their Lordships of the Supreme Court in the case of *State of Punjab v. Balbir Singh*, : 1994 CriLJ3702 held that Section 50 confers a Valuable right on the person to be searched in the presence of a Gazetted Officer or a Magistrate if he so requires. Such a search would impart more authenticity and credit-worthiness to the proceedings while equally providing an important safeguard to the accused. The authorised officer is obliged to inform the accused of this right of the accused to afford him a proper opportunity to make option. This provision confers an important and valuable right and is intended to minimise the allegations of planting or fabricating by the prosecution and is mandatory. Its non-compliance would affect the prosecution case seriously and vitiate the Trial. In this view of the matter,

the prosecution has failed to establish that the accused was made to understand the import of this Section and particularly the meaning of abbreviation used in the notice under Section 50 of the Act.

10. Learned amices Curiae submitted that the right conferred by the Section 50 is indeed a valuable right of the accused and there has to be a strict and complete compliance of this Section. She submitted that in the instant case the accused appellant was not made to understand the real import of abbreviation 'G.O'. Even according to the prosecution the accused appellant is a vagabond and illiterate. He only knew to write his name. Learned amices Curiae submitted that in view of this lacuna, the conviction of the appellant is liable to be set aside. Since the Apex Court in the Balbir Singh's case (supra) clearly observed that it was obligatory on the part of the officer conducting search to inform the person to be searched about his right, the safeguard under Section 50 is of primary importance and conferred a valuable right. therefore, it is imperative requirement on the part of a officer intending to search and inform the person to be searched of his right that if he so chooses, he will be searched in the , presence of a Gazetted Officer or a Magistrate. The accused appellant was not informed of this valuable right. There is clear non-compliance of this mandatory provision and the accused appellant is entitled to its benefit.

11. Ms. Tamali Wad, learned amices Curiae submitted that the notice under Section 50 carries FIR No. 239 dated 29-12-1990. She submitted that the FIR number has been written with the same ink and handwriting as the rest of the document. The same is in the case of recovery memo, site plan and the ruqqa. As the FIR is always registered subsequently, only when the notice, recovery memo, ruqqa etc. are taken to the police station, therefore, how could the number of the FIR be given on the top of these documents, in the same ink and the handwriting when the FIR itself could not be registered so far.

12. In the FIR, while the time of occurrence is stated to be 10.15 p.m., there is no mention of the time at which the FIR was formally registered. In other words, the said FIR does not carry the time of registration, which is a serious lacuna in the case of the prosecution. According to Ms. Tamali Wad, learned amices Curiae, all

these factors cumulatively raise suspicion that the whole case of the prosecution was false, concocted and fabricated. Ms. Wad also mentioned that the appellant is an illiterate vagabond and therefore, he is an easy prey to the designs of corrupt and dishonest policemen. She further submitted that it must not be lost sight of, that often policemen having accepted bribes from the guilty and the real offenders, let them go and instead rope in illiterate and rustic men who are not aware of their rights and safeguards and, therefore, are easy preys for conviction under the NDPS Act. She submitted that the provisions of the NDPS Act are misused and abused in a very large number of cases. The Courts in order to render Justice ought not to ignore pragmatic aspect how the provisions of this Act are abused. She also submitted that a large quantities of contraband are planted, such as in the present case in order to put adequate pressure on the minds of those adjudicating the said cases. The learned amices Curiae also submitted that poppy husk powder is not expensive substance and easily available and a large quantity of this substance is often used in cases of false implications.

13. Ms. Tamali Wad, learned amices Curiae also submitted that the CFSL form, a valuable piece of documentary evidence, is completely missing from the entire story of the prosecution. Although the oral testimony of the prosecution witnesses indicate that the same was prepared and deposited with the Moharar Malkhana, the Entry 19A Register does not record such a deposit. Ms. Tamali Wad submitted that at best the said Entry 19A Register records the fact that the CFSL form was filled in and Along with the sealed sample was handed over to the SHO. However, the said document does not record the deposit of same with Moharar Malkhana by the SHO. Hence, missing of such a vital link evidence, is fatal to the case of the prosecution.

14. Learned amices Curiae further submitted that the said Entry 19A Register records that on 11.1.1991 the sealed sample was sent to the CFSL Laboratory, but does not talk of sending of the CFSL form to the Laboratory or its return from the said laboratory. She submitted that this conclusively proves that the CFSL form was never prepared and the question of sending it to the CFSL did not arise.

15. Learned amices Curiae also submitted that there is no evidence of the missing CFSL form, except for the oral statement of some of the witnesses to the effect that the CFSL form was filled up. In this view of the matter, she submitted that the Court ought not to accept the oral prosecution evidence in This case. Learned amices Curiae also submitted that the missing CFSL form raises the possibility of the sample being tampered with during their custody. There is absolutely nothing on record to prove that the CFSL form was deposited with the Moharar Malkhana or sent to the CFSL or what it was ever received back. It has been observed by the Supreme Court in a number of cases that the list of articles received by the CFSL must always include the sealed sample and the CFSL form, which was not the case in the present matter.

16. Learned amices Curiae submitted that if the CFSL form was not sent to the Laboratory that how, were the specimen seals compared with that on the seals on sample because it is the CFSL form that carries the specimen seals. therefore, this raises a serious doubt about tampering of the sample and even on this count, the benefit of doubt ought to have been given to the appellant.

17. Learned amices Curiae submitted that the CFSL report in the column for analysis merely gives the result without disclosing any analytical data supporting the conclusion of the analysis. The report states that the sample was found to be poppy powder without giving any details of the method as to how the result was reached or arrived at. According to the learned amices curiae no conviction can be made in a case when there are so many lacunae and infirmities in the prosecution version.'

18. Learned amices Curiae also placed reliance on a Judgment of the Supreme Court in the case of State of Himachal Pradesh v. Jai Lal and Ors. : 1999 CriLJ4294 . The court observed that an expert is not a witness of fact, his evidence is really of advisory character and it is the duty of an expert witness to furnish the Judge with necessary scientific criteria for testing the accuracy of the conclusion so as to enable the Judge to form his independent judgment by the application of this criteria to the facts proved by the evidence of the case.

19. It is also submitted by the learned amices Curiae that the credibility of such a witness depends on the reasons stated in support of his conclusions and the data and materials furnished which form the basis of his conclusion. In the instant case the expert who had tested the alleged sample and given a report was not even examined. His report does not furnish any analytical data and, therefore, no reliance could be placed on such a piece of evidence because it is not supported by any analytical data.

20. Mr. Tamali Wad, learned amices Curiae further submitted that an interesting fact which shrouds the case of the prosecution with doubt is the deposition of a public witness Raju Pandey. He revealed that he had lost the two seals given to him for keeping in safe custody. The seals are normally given to the public witnesses in the NDPS cases to ensure that samples are not tampered with, till the samples reach the CFSL for examination. The fact that Raju Pandey had lost the seals was never even reported to the police. No FIR to this effect had been registered. There is nothing on record to show that the fact of loss of seals was ever brought to the notice of the concerned authorities. Hence, in the absence of cogent reasons in support of the loss, it must be inferred that the seals were in fact never given to Raju Pandey. Learned amices Curiae submitted that this fact raises a presumption of tampering with of sample, and fabrication of prosecution story, the benefit of which ought to have been given to the appellant.

21. Ms. Tamali Wad submitted that the provisions of Section 57 of the NDPS Act which are also mandatory in nature have not been complied with. She submitted that strict compliance of the provisions of Section 57 is necessary. Non-compliance of Section 57 amounts to failure of justice and any contravention of the same could affect the prosecution case and vitiate the trial.

22. Learned amices Curiae submitted that there has been a delay of 13 days in sending the sample for testing. She submitted that the prosecution has not advanced any cogent reasons explaining why it took over 13 days for the sample to be sent for testing to the CFSL located in Delhi itself. She pointed out that this Court in the matter of *Des Raj v. State*, 83 (2000) DLT 282 had held a delay of 12 days to be fatal for the prosecution and consequently set aside the conviction. It is

pertinent to point out that certain vital contradictions in the deposition of the prosecution witnesses have been overlooked by the learned Additional Sessions Judge. While the investigating officer has deposed recovery of gunny bag from the accused, the depositions of other witnesses reveal recovery of plastic bag containing the alleged contraband. Further Inspection Ramesh Chand, SHO in his statement neither mentions the presence of Raju Pandey, public witness nor the fact that the seized contraband was weighed in his presence. Also Raju Pandey, public witness has not satisfactorily explained his presence at the spot at 10. p.m. on a cold winter night of 29.12.1990. There is also contradiction in the deposition of the prosecution witnesses regarding the kinds of weights and measures brought at the spot and used for weighing the seized contraband. Learned amices Curiae submitted that the Trial Court was in error in overlooking these omissions as minor omissions.

23. I have heard learned amices Curiae and the learned counsel appearing for the State. Section 50 of the NDPS Act envisages valuable safeguard for the rights of the ' accused of being searched before a Gazetted Officer or a Magistrate. This is indeed an extremely important right of the accused so that apprehension of false implication in such cases is minimised. It is the bounden duty and the obligation of the prosecution to ensure that the accused understand this valuable right in a proper perspective, particularly, when an accused is an illiterate or a vagabond. Even educated people may not always understand the meaning of the abbreviation G.O. (Gazetted Officer). In this view of the matter it would hardly be proper to expect an illiterate vagabond to know the full meaning of abbreviation G.O.

24. The sanctity of his valuable right has to be preserved. Unless the prosecution ensures that the accused was made fully aware of his right, the chances of false implication cannot be ruled out. The strict compliance of the provisions of this Section is absolutely imperative. The Legislature in its wisdom has provided for a very stringent punishment. The minimum period of imprisonment is ten years rigorous imprisonment and a fine of Rs. 1 lakh and in default of payment of fine to further undergo a period of imprisonment to be specified by the Court. therefore, it is all the more necessary to ensure strict compliance of the mandatory provisions

of the law. In the instant case the prosecution has failed to establish full compliance of the provisions of Section 50 of the NDPS Act.

25. It is the normal procedure that when the incriminating articles are seized and are required to be sent to the Central Forensic Science Laboratory those articles are immediately sealed and deposited in Malkhana at the Police Station till they are taken out and sent to the Laboratory. In the instant case this was not done. Contemporaneously with seizure and sealing of such articles, impression of seal used on sealed articles is put on a form, commonly called, the CFSL form. This is so done because at the time of analysis of sealed packets in laboratory, the analyst concerned is able to tally seal impressions on sealed packets with those appearing on the CFSL form in order to rule out any possibility of tempering of seals on sealed packets after seizure anywhere or in transit till receipt in laboratory. The important of the CFSL form thus cannot be over-emphasized because this document provides a valuable safeguard to an accused to ensure that no tampering has been done during intervening period. The CFSL form is a document or forwarding note accompanying a sample sent by the Police to the Forensic Science Laboratory, Such a form contains the nature of crime, list of samples being sent for examination, nature of examination required and specimen of the seal/seals affixed on the exhibit besides particulars of the Case/Police Station.

26. Delhi High Court Rules and Orders, Part-III Chapter 18B lays down instructions to be followed while making references to Chemical Examiner, and some instruction, inter-alia, are as follow:-

'1. Medical Officer to be consulted about articles to Chemicals Examiner-

(i)....

(ii) In cases where human subjects are not concerned, the Police may send articles to, and correspond direct with the Chemical Examiner.

(iii)...

Everything upon which the Chemical Examiner's opinion is necessary should be forwarded to him with the least possible delay.'

2 to 6...

'7. Articles to be packed and sealed in the presence of the forwarding officer--All the articles on being put up by the forwarding officer, and sealed and numbered by him, should be packed in his presence and under his immediate supervision; the package should then be sealed by him, in accordance with the usual rules of the Post Office as to parcels, in such a manner that it cannot be opened without destroying the seal. The seal used should be a private seal, and the same throughout.'

'8. Invoice of articles and post-mortem report or statement to accompany articles--In all cases of transmission of articles to the Chemical Examiner, whether by a Magistrate, Medical Officer, or the Police, a letter of invoice, giving a full description of the articles sent, should be dispatched by post, together with the statement or post-mortem report. A duplicate of the invoice should also be placed between the wax-cloth and the box to accompany the package. Both copies of the invoice should be stamped with an impression of the seal referred to in paragraph 7.'

'9. Evidence should be taken to prove that Chemical Examiner's report refers to the subject connected with the inquiry. In inquiries or trials, where reference has been made to the Chemical Examiner, it will be the duty of the Magistrate to examine the official who dispatched the articles for analysis with regard to the identity of the invoice and seal, and thereby establish the identity of the subjects reported on with those sent for analysis, and prove that the Chemical Examiner's report refers to the subject connected with the case under inquiry. If the decision of the case turns on the results of the Chemical examination a copy of the judgment and of the evidence regarding symptoms and post-mortem appearance will be supplied to the Chemical Examiner; such copies being made at the expense of the Government as a special charge.'

10.....

'11. Proper custody to articles to be proved--In all cases in which articles are brought up in evidence, the custody of such articles, throughout the various stages of the inquiry must be clearly traced and established. Evidence must be recorded on this point, and the evidence should never leave it doubtful as to what person have had charge of the articles at any stage of the proceedings. All such articles must be distinctively marked, and any reference to them in the record must be so clear as to leave no room for doubt as to the special articles referred to.'

27. According to the aforesaid instructions it is amply clear that the articles should be sent with promptitude. The packet containing the articles should be sealed by the forwarding officer in such a manner that it may not be opened without destroying the seal. The seals used should be same throughout. The copies of latter of invoice have to be prepared containing a full description of articles sent. Original invoice together with statement accompanying the articles should be sent by post. A duplicate of the invoice should be placed between the wax-cloth and the box to accompany the package. Both copies of the invoice should be stamped with an impression of the seal used on the package. It is the duty of the Trial Court to examine official concerned to establish identity of articles reported on with those sent for analysis for purposes of proving that . Chemical Examiner's report refers to the subject under Trial.

28. In a large number of NDPS cases the Courts have observed that the prosecution has to establish that the CFSL form was deposited in Malkhana and had thereafter been sent along with sample to CFSL otherwise there is a possibility that there could be tampering with seals of samples sent to CFSL, and as such sealed samples did remain with their seals intact before reaching office of CFSL.

29. Their Lordships of the Supreme Court in the case of State of Rajasthan v. Daulat Ram, 1980 CCC 83 under the Opium Act, 1878 observed that the admitted case of the prosecution was that the samples changed several hands before reaching the Public Analyst, and yet none of the concerned witnesses was examined by the prosecution to prove that while the samples were in their custody, the seals had not been tampered with. The Apex Court observed that the

inevitable effect of this omission is that the prosecution failed to rule out the possibility of the samples being changed or tampered with during this period--fact which had to be proved affirmatively by the prosecution.

30. This Court in *Lacho Devi v. State*, 1990 (2) CCC 395 observed that it was incumbent upon the prosecution to prove by cogent evidence all links to prove that the case property was not tampered with by any one till the samples were deposited in the CFSL for analysis. The Court held that the link evidence was missing to the effect that the sealed parcels had not been tampered with by any one before they were deposited in the Malkhana, and there was no cogent reliable evidence that the CFSL form had, also been deposited with Moharar Malkhana and that it also remained in his custody till it had been sent with the samples to CFSL.

31. In another leading case *Pradeep Kumar v. State*, 1990 CCC 69 this Court observed that one of the safeguard which could ensure sanctity of seal, was affixation of specimen of the seal on the CFSL form which had to be done simultaneously with sealing of parcels.

32. The Division Bench of this Court in *Amarjit Singh and Anr. v. State (Delhi Admn)*, 1995 JCC 91 observed that it was for the prosecution to prove that not only the case property was duly sealed with the particular seals and was duly deposited in the Malkhana untempered but it was also incumbent on the prosecution to show that the samples which had been duly sealed, remained intact till they reached the office of CFSL. In proving these facts, it was necessary for the prosecution to prove that the CFSL form containing the specimen seals which was duly filled in at the time of taking the sample also remained intact and it reached the office of CFSL along with the samples. Same view has been taken in a large number of cases decided by this Court and other Courts.

33. In the present case the prosecution has clearly failed to discharge the sacred duty and obligation to have kept the samples of the contraband articles and CFSL form intact till the sample reached the CFSL.

34. In view of the aforesaid lacunae in the prosecution case the benefit has to go to the accused appellant.

35. There are other serious lacunae in the prosecution case such as:-

1. Non-compliance of Section 50 of the NDPS Act.
2. No Explanationn for missing of the CFSL form.
3. Delay of 13 days in sending the sample for testing without any reasonable Explanationn.
4. Non-compliance of Section 57 of the Act.
5. Seal given to Raju Pandey, (the only independent witness) were lost. Police was not informed and no FIR was filed.
6. The prosecution failed to established that the samples of the contraband substance taken remained intact before they reached the Central Forensic Science Laboratory for testing.
7. The expert who had tested the sample and given a report was not examined.

36. It is not necessary to burden this judgment with the consequences of aforesaid lacunae in the prosecution version since the appeal is allowed only on the short ground that prosecution has failed to keep the sample of the contraband article intact before the same reached the Central Forensic Science Laboratory.

37. Consequently, the appeal is allowed and judgment of the Learned Additional Sessions Judge is accordingly set aside. The appellant shall be released forthwith, if not required to be detained in any other case.

38. Before parting with this case I would like to place on record my deep sense of appreciation for the most valuable assistance provided by the learned amices Curiae, Ms. Tamali Wad, in this case.

39. Present: Mr. Raman Sawhney for the State.

Crl.A.103/93.

40. The Superintendent Jail, Tihar is directed to send nominal roll of the appellant within three days through a special messenger. A letter in this respect be sent to the Superintendent, Tihar Jail, List on 20th January, 2000.

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