

Bhanwarlal Vs. State of Rajasthan

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Court : Rajasthan

Decided On : Aug-07-2001

Reported in : AIR2001Raj365; 2002(5)WLC432; 2002(2)WLN323

Judge : Sunil Kumar Garg, J.

Acts : [Narcotic Drugs and Psychotropic Substances Act, 1985](#) - Sections 8 and 15

Appeal No. : S.B. Criminal Jail Appeal No. 791 of 1999

Appellant : Bhanwarlal

Respondent : State of Rajasthan

Advocate for Def. : Ramesh Purohit, Public Prosecutor

Advocate for Pet/Ap. : Vinod Sharma, Adv.

Disposition : Appeal dismissed

Judgement :

Garg, J.

1. This appeal has been filed by the accused appellant from jail against the judgment and order dated 7.12.1999 passed by the learned Special Judge, NDPS Cases, Bhilwara in Sessions Case No. 25/98 by which he convicted the accused appellant for the offence under Section 8/15 of the [Narcotic Drugs and](#)

[Psychotropic Substances Act, 1985](#) (hereinafter referred to as 'the NDPS Act') and sentenced him to undergo ten years rigorous imprisonment and to pay fine of Rs. one lac, in default of payment of fine, to further undergo six months RI.

2. Since nobody was representing the accused appellant as this appeal has been preferred from jail, therefore, this Court vide order dated 28.3.2001 appointed Shri Vinod Sharma, Advocate as Amicus Curiae to argue the case behalf of the accused appellant and thus, he has argued the same.

3. The facts giving rise to this appeal, in short, are as follows:-

PW2 Ramesh Chandra made a parchakayami (Ex.P/7) on 3.5.1998 at about 6.30 PM in capacity as SHO, Polio- Station Bijoliya District Bhilwara stating inter-alia that on 3.5.1998 at about 3.00 PM, a secret information from mukhbir was received in the Police Station to the effect that one person, who was wearing turban and having mousetaches, would come from the side of Madhya Pradesh (Singoli) on cycle and would go towards Bundi and he was having contraband opium doda chura. That information was reduced into writing by PW 2 Ramesh Chandra on Ex. P/1, as per the provisions of Section 42(1) of the NDPS Act and to make compliance of Section 42(2) of the NDPS Act, through PW 1 Harish Kumar that information was sent to PW 7 Vinay Kumar, Dy. S.P. Thereafter, PW 2 Ramesh Chandra alongwith PW 6 Ramswaroop and other police officials proceeded in a Government Jeep towards the spot and reached Bundi road near Mandol dam and at about 5.00 PM, one person of the same identity as disclosed in the secret information was seen coming on cycle from the side of Bijoliya and on the back of cycle, there was a bale and seeing PW 2 Ramesh Chandra, that person tried to run away, but he was apprehended and on being asked, he told his name as Bhanwarlal (present accused appellant) and two motbirs, namely, PW3 Hazarilal and PW 4 Chhitarlal were already with PW 2 Ramesh Chandra. Thereafter, the accused appellant was given notice (Ex.P/3) under Section 50 of the NDPS Act asking him whether he wanted to be searched before the Magistrate or Gazetted Officer and upon this, he gave his consent that he could be searched by PW 2 Ramesh Chandra. Thereafter, the accused appellant was searched and on search, a bale was recovered and on opening it, a white colour katta was found

and in that katta contraband opium doda chura was found and on being tasted, it was assessed that it was nothing but contraband opium doda chura and on being asked, the accused appellant told that he had no valid license to keep that contraband article. Thereafter, it was weighed and its weight was found to be 6 kg. 400 grms., out of which, one sample of 500 grms. was taken for the purpose of chemical analysis and it was sealed on the spot separately and marked as A-1 and the remaining contraband article was also sealed on the spot separately and marked as A. The fard of search and seizure Ex.P/4 was prepared on the spot by PW 2 Ramesh Chandra. The accused appellant was arrested through Ex. P/5. The fard of specimen seal impressions is Ex. P/5. The fard of specimen seal impressions is Ex. P/5. The fard of specimen seal impressions is Ex. P/6. On this parchakayami Ex; P/7, regular FIR Ex.P/8 was chalked out and further investigation of the case was handed over to PW 7 Vinay Kumar. The information under Section 57 of the NDPS Act was sent by PW 2 Ramesh Chandra to SP, Bhilwara through Ex.P/11. The seized articles alongwith sample were handed over by PW 3 Ramesh Chandra to PW 6 Ramswaroop, who deposited them in Malkhana and made entries in Malkhana Register Ex. P/19. Thereafter, vide letter Ex. P/13 sample A-1 was sent to SP, Bhilwara through PW 5 Kamlesh Kumar for sending it to FSL, Udaipur for chemical analysis and vide letter Ex.P/17 sample A-1 was sent to FSL. Udaipur through PW 5 Kamlesh and PW 5 Kamlesh Kumar deposited the sample A-1 in FSL. Udaipur and got the receipt Ex. P/18. The FSL report is Ex.P/14, where it was reported that the sample contained in packed marked A1 gave positive test for the major chemical constituents of coagulated juice of opium poppy. Hence the sample is of fragments of poppy capsules from which juice has been extracted.

After usual investigation, police submitted challan in the Court against the accused appellant.

On 29.7.1998, the learned Special Judge, NDPS Cases, Bhilwara framed charge for the offence under Section 8/15 of the NDPS Act against the accused appellant. The Charge was read over and explained to the accused appellant, who pleaded not guilty and claimed trial.

During trial, the prosecution in support of its cases examined as many as 8 witnesses and got exhibited some documents. Thereafter, statement of the accused appellant under Section 313 Cr.P.C. was recorded. In defence, no evidence was produced by the accused appellant.

After conclusion of trial, the learned Special Judge, NDPS Cases, Bhilwara through his judgment and order dated 7.12.1999 convicted and sentenced the accused appellant in the manner as indicated above holding inter-alia that the prosecution has proved its case beyond all reasonable doubts against the accused appellant for the offence u/Section 8/15 of the NDPS Act.

Aggrieved from the said judgment and order dated 7.12.1999 passed by the learned Special Judge, NDPS case, Bhilwara, this appeal has been filed by the accused appellant from jail.

4. In this appeal, the learned counsel appearing for the accused appellant has made the following submissions:-

(1) That there is evidence in this case that in the fard of search and seizure Ex. P/4, there is no mention of the fact that rest contraband opium doda chura was marked A and sample was marked A-1 and furthermore, only one sample was taken, which is not proper one and furthermore, when PW 6 Ramswaroop gave sample to PW 5 Kamlesh Kumar for depositing it in the FSL, he did not obtain the signature of PW 5 Kamlesh Kumar and furthermore, in forwarding letter Ex.P/13, the name of bearer of that latter PW5 Kamlesh Kumar is not mentioned and furthermore, sample of 500 grms, was taken, while FSL report Ex.P/14 shows that weight of the sample was 522 grms, and in these circumstances, it can be inferred or presumed that recovered articles and sample were not kept in proper custody and proper form and on this ground alone, the accused appellant is entitled to acquittal.

(2) That both motbir witnesses, namely, PW 3 Hazarilal and PW 4 Chhitarlal have been declared hostile and since they are not supporting the prosecution case, therefore, the prosecution case becomes doubtful.

Hence, it was prayed that this appeal be allowed and the accused appellant be acquitted of the charge framed against him.

5. On the other hand, the learned Public Prosecutor supported the impugned judgment and order passed by the learned Special Judge, NDPS Cases, Bhilwara.

6. I have heard the learned counsel for the accused appellant and the learned Public Prosecutor and perused the record of the case.

7. To appreciate the above contentions, the evidence of this case has to be seen.

8. So far as the fact that contraband opium doda chura was recovered from the possession of the accused appellant is concerned, the same stands proved from the statements of PW 2 Ramesh Chandra and PW 6 Ramswaroop.

9. PW 2 Ramesh Chandra, who conducted the search and seizure in the present case and who was at the relevant time SHO Police Station Bijoliya, has admitted the following facts in cross-examination:-

(1) That it is correct to say that in the fard of search and seizure Ex.P/4, there is no mention of the fact that recovered articles are marked as A and sample was marked as A-1 and similarly, in fard of specimen seal impressions, they were not marked as such.

(2) That all the proceedings were written by his constable PW 6 Ramswaroop, but Ex.P/4 fard of search and seizure was written by Bhagwatsingh.

(3) That it is also correct to say that in forwarding letter Ex.P/13, the name of the bearer of that letter is not mentioned.

(4) That in the information Ex.P/11, which was sent to SP, Bhilwara under Section 57 of the NDPS Act also, the fact that seized articles were marked as A and sample was marked as A-1 is not mentioned.

10. PW5 Kamlesh Kumar states that he took the sample from PW 6 Ramswaroop for depositing it in the FSL and thereafter, he produced the sample before PW 8 Bhagwatilal in the SP Office and from where he took the forwarding letter and

deposited the sample in FSL, Udaipur on 19.5.1998 and got the receipt Ex.P/18.

11. PW 6 Ramswaroop is the witness, who was Malkhana incharge at the relevant time. He has proved the entries made in Malkhana Register Ex.P/19, but he has admitted the fact that when he gave sample to PW 5 Kamlesh Kumar, Ex.P/19 and he has further admitted that in the fard of search and seizure Ex.P/4, the fact that articles were marked as A and sample was marked as A-1 was not mentioned.

12. PW 8 Bhagawatilal has further stated that PW 5 Kamlesh Kumar came to him alongwith sample and he gave the forwarding letter Ex.P/17 to him.

13. In my considered opinion, from the evidence on record that after recovery of contraband articles, both sample as well as remaining articles were given by PW 2 Ramesh Chandra to PW 6 Ramswaroop, who deposited the same in Malkhana and made entries in Malkhana Register Ex.P/19 and, thereafter, he gave sample to PW 5 Kamlesh Kumar through letter Ex.P/13 and, thereafter, PW 5 Kamlesh Kumar after obtaining forwarding letter Ex.P/17 from SP Office, deposited the sample in FSL, Udaipur, it can reasonably be inferred or concluded that the articles seized and sample have been kept in proper custody and proper form and seals on the articles and sample remained intact and have not been tampered with in any manner. There is evidence to prove the fact that sample was not tampered with after seizure, it was kept intact in the Malkhana and in the same condition, it was sent for chemical examination.

14. The non-mentioning of the fact in the fard of search and seizure Ex.P/4 that sample was marked as A/1 and remaining articles were marked as A does not lead to the conclusion that no recovery was made from the accused appellant. Similarly, if signatures of PW 5 Kamlesh Kumar were not taken on the Malkhana Register Ex.P/19 by PW 6 Ramswaroop at the time of giving sample for depositing, it in FSL, it does not mean that PW 6 Ramswaroop did not give sample to PW 5 Kamlesh Kumar.

15. The fact that only one sample was taken and not two is a matter that requires consideration and this defect may be regarded as mere irregularity, but in the present case, on this ground alone, whole prosecution case cannot be thrown,

especially when there is evidence that sample was not tampered with till it reached the FSL for chemical analysis.

16. So far as argument with regard to difference in weight of sample is concerned, there is evidence that when sample of opium dada chura was taken, its actual weight was 500 grms, excluding the weight of cloth cover, but the weight of the sample shown in the FSL report to be 522 grms, includes the weight of cloth cover also and thus, the weight might have been' increased because of cloth cover and apart from this, the difference in the weight is small and negligible, which could be due to some minor defect in weight measures, even FSL report showed that the weight shown as 522 grms, as approximate. Hence, this argument would not be helpful to the accused appellant.

17. Though both the motbir witnesses, namely, PW 3 Hazarilal and PW 4 Chhitarlal have been declared hostile, but they have admitted their signatures on relevant facts. Therefore, if they have been declared hostile, the case of the prosecution is not affected, rather since they have admitted their signatures on the relevant documents, it should be held that these documents were executed in their presence and they are not telling truth in the Court.

18. For the reasons stated above, the findings of the learned Special Judge convicting the accused appellant for the offence under Section 8/15 of the NDPS Act are liable to be confirmed and this appeal is liable to be dismissed.

Accordingly, the appeal filed by the accused appellant Bhanwarlal from jail fails and is hereby dismissed, after confirming the judgment and order dated 7.12.1999 passed by the learned Special Judge, NDPS Cases. Bhilwara.