

Ayub Vs. State of Rajasthan

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Court : Rajasthan

Decided On : Jan-07-2002

Reported in : 2002CriLJ1619

Judge : O.P. Bishnoi, J.

Acts : Narcotic Drugs and Psychotropic Substances Act, 1985 - Sections 8, 18, 50, 55 and 57

Appeal No. : Crl. Appeal No. 474 of 2001

Appellant : Ayub

Respondent : State of Rajasthan

Advocate for Def. : Ramesh Purohit, Public Prosecutor

Advocate for Pet/Ap. : Sandeep Mahta, Adv.

Disposition : Petition allowed

Judgement :

O.P. Bishnoi, J.

1. This is an appeal filed by the appellant-Ayub Khan against the judgment dated 13-7-2001 of the Special Judge, N.D.P.S. cases, Pratapgarh whereby the appellant-Ayub Khan was found guilty under Sections 8/18 of the Narcotic Drugs

and Psychotropic Substances Act, 1985 (hereinafter referred to as 'the N.D.P.S. Act') and was awarded 10 years' rigorous imprisonment along with fine of Rs. 1,00,000/-. For non-payment of fine, he has been ordered to further undergo rigorous imprisonment for a period of 2 years.

2. The prosecution story in brief, is that on 27-1-1999 the S.H.O. of Police Station, Arnod, District Chittorgarh P.W. 11 Anil Joshi at 3.00 p.m. received a secret information to the effect that the accused-Ayub Khan was likely to go towards village Devaldi from village Kotri via bus stand Faredi with illicit opium. The information was recorded in the 'Rojnamcha' as Ex. P/20 and the S.H.O. proceeded to effect a 'Nakabandi' at a place between village Devaldi and the bus stand, Faredi where the accused was expected to come. At about 4.15 p.m. the accused appeared at the place of the 'Nakabandi' and was stopped. He was given the option under Section 50 of the said Act to get himself searched in the presence of a Magistrate or some Gazetted Officer, if he so liked. He, however, agreed to be searched by the police people. The search allegedly yielded opium weighing 500 gm. Two samples each containing 30 gms. opium were separated and sealed on the spot. The recovery memo and other documents were prepared, the accused was arrested and the FIR was lodged at Police Station, Arnod, against the appellant and the co-accused-Lal Singh from whom the opium in question was allegedly purchased by the appellant. During the course of investigation Lal Singh was also arrested and a challan was filed against both the accused persons in the said Court. However, an order of discharge was passed in respect of the co-accused-Lal Singh on 3-8-1999 and a charge under Section 8/18 of the N.D.P.S. Act was framed against the appellant. He pleaded not guilty. As many as twelve witnesses were examined by the prosecution in support of its story. No defence evidence was led by the accused. The learned trial Court heard the arguments and delivered the judgment on 13-7-2001 as stated above against which this appeal has been filed.

3. I have heard learned counsel for the appellant and learned Public Prosecutor for the State and I find that the appeal is fit to be allowed.

4. It has come in the evidence that after the alleged recovery two samples weighing 30 gms. each were separated and one of the samples were sent to the public analyst for chemical examination. Chemical examination report Ex. P/23 has been received and according to it the material was chemically examined, which was found to be juice of opium poppy and contained 9.60% morphine in it. However, Ex. P/23 makes mention that the material sent to the FSL was weighed and it was found to be approximately 15.5643 gms. along with the weight of polyethylene bag and the thread which were used before sealing the material. The defence argument is to the effect that the sample taken on the spot weighted 30 gms. whereas the packets which was examined by the public analyst weighed only half of it and thus, it is clear that either it was a different packet or the same was tampered sometime after 27-1-1999. On the strength of the above argument it is contended that the appellant cannot be connected with the crime.

5. I find the argument acceptable. In the case of Gopal v. State (RCC, October, 1998 p. 417) 30 grams opium was taken out as sample and when weighed at the FSL, it was found weighing 23 grams. In another case of Sushil Sharma v. State of Rajasthan, 2000 Cri LR 549 (Raj), the weight of the sample was 30 grams but it was found to be 26 grams by the Public Analyst. In both the cases this Court found that the difference in weight created strong suspicion and in both the cases the accused persons were acquitted on that account. In the instant case, as pointed out earlier, the weight of the material, along with packing material has been found to be 15,5643 gms. only and in view of the opinion expressed by this Court in the earlier two cases, the appellant is entitled to be acquitted.

6. During the course of arguments, I have been taken through the evidence and vari-ous inconsistencies have been highlighted. P,W. 2 Mahaveer Singh, Head Constable and P.W. 5 Guman Singh, Constable have stated to the effect that the police people and the 'MOTBIRS' were hiding in the bushes and when the accused appeared they came out and stopped him. However, the only independent 'MOTBIR' Arun Singh (P.W. 1) does not state that they were hiding in the bushes. According to P.W. 1 Arun Singh and police driver Shankar Lal (P.W. 3), the 'Nakabandi' was effected at the bus stand, Faredi where the recovery was made. Arun Singh has stated that the accused alighted from a bus and was

stopped for the search. Shankar Lal does not say that the accused boarded any bus or alighted from any bus. His testimony is to the effect that the accused appeared on foot from the CHUPNA side.

7. P.W. 11 Anil Joshi, in his examination-in-chief on 31-5-2001, says that the place of recovery was one furlong away from the bus stand, Faredi. However, during the cross-examination on 6-6-2001 his statement is to the effect that the recovery was made just 25 ft. away from the bus stand. He could not say as to whether the bus from which the accused alighted was a private one or belonged to the Rajasthan State Roadways Transport Corporation. At one point he says that neither any bus arrived there nor any passengers alighted from the same. Subsequently he says that the bus did come and lot many passengers alighted from the same. In this connection it is pertinent to note that out of the two 'MOTBIRS' only one P.W. 1 Arun Singh is independent and the other 'MOTBIR' P.W. 2 Mahaveer Singh is a Police, Head Constable, S.H.O., Anil Joshi has stated to the effect that there was no other independent person available and hence, none other than Arun Singh could be requested to act at 'MOTBIR' but in his cross-examination P.W. 11 Anil Joshi has admitted that although lot many passengers alighted from the bus but none was requested to act as a 'MOTBIR' of recovery. I find the whole story unacceptable.

8. In a case of recovery the S.H.O. has to seal the material with his personal seal and under Section 55 of the Act the packets are to be resealed by the seal of the police station at the time of their deposit in the 'Malkhana.' There is no evidence that the packets were resealed.

9. I find that there is no compliance of Section 57 of the Act as well. The S.H.O. has orally stated that the detailed report was sent to the higher police officials. But there is no material on record to suggest that the report was actually sent. Nobody has been examined to prove that actually any report was sent and was delivered to the higher police officials.

10. Consequently, the appeal is allowed and the judgment dated 13-7-2001 finding the appellant guilty is set aside. The accused-appellant is acquitted of the charge. The amount of fine, if deposited by him, shall be refunded to him.

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