

Ram Prakash Vs. State

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Court : Delhi

Decided On : Dec-10-2014

Judge : S. Muralidhar

Appellant : Ram Prakash

Respondent : State

Advocate for Def. : Mr. Rajat Katyal

Advocate for Pet/Ap. : Mr. Naveen Gaur, Mr. Vijay Gaur, Mr. Raj Jaiswal

Judgement :

IN THE HIGH COURT OF DELHI AT NEW DELHI CRL.A. 1363 of 2014 Reserved on: November 27, 2014 Decision on: December 10, 2014 RAM PRAKASH Appellant Through: Mr. Naveen Gaur, Mr. Vijay Gaur and Mr. Raj Jaiswal, Advocates. versus STATERespondent Through: Mr. Rajat Katyal, APP for the State. CORAM: JUSTICE S. MURALIDHAR

JUDGMENT

1012.2014 1. This appeal is directed against the judgment dated 2nd July 2014 passed by the learned Special Judge in SC No.68 of 2011 convicting the Appellant for the offence under Section 20(b) (ii) (C) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS), and the order on sentence dated 8th July 2014 sentencing him to undergo rigorous imprisonment (RI) for 11 years and to pay fine of Rs. 1.25 lakhs and in default to undergo simple imprisonment (SI) for six

months. The case of the prosecution 2. ASI Mahender Singh PW-9 stated that on 4th June, 2011, at around 1.30 pm a secret informer conveyed to him that Ram Prakash (the Appellant), resident of District Ambedkar Nagar, Uttar Pradesh and presently residing in Jahangir Puri and who was indulging in the supply of ganja in Delhi would come to the Old Delhi Railway Station at around 3.30 pm, would load ganja from the parking lot situated towards Western side and then proceed to Jahangir Puri. PW-9 apprised Inspector Kuldeep Singh (PW-10) posted at the Narcotics Cell, Shakarpur. He recorded DD No.14 at around 2 pm. PW-10 made enquiries from the informer and after being satisfied passed on the information telephonically to Mohd. Iqbal, Assistant Commissioner of Police (ACP) Narcotics. Daily Diary (DD) No.14 dated 4th June 2011 was received by the Head Constable (HC) Om Prakash (PW-2) and was entered in Diary No.996. The said DD entry according to PW-2 was placed before the ACP Mohd. Iqbal, who after going through its contents, put his initials thereon. The ACP ordered a raid to be conducted.

3. PW-9 constituted a raiding party of comprising himself, PW-2, HC Mukesh (PW-4), HC Braham Dev, HC Rajesh and the secret informer. PW-9 took with him the Investigating Officer (IO) kit bag, field testing kit, electronic weighing machine and spring weighing scale. He is stated to have made departure entry vide DD No.15 at around 2.15 pm, before leaving the Narcotic Cell in a government vehicle driven by HC Rajesh Kumar. The raid proceedings 4. PW-9 stated that they reached Old Delhi Railway Station via Pushta Road, Geeta Colony, Shanti Van, Yamuna Bridge, Ring Road, Yamuna Bazaar, Koudia Pul. They alighted a little ahead from Church Mission Red Light. The secret informer pointed to a person sitting on the right side of Old Delhi Railway Station parking gate, Western side and stated that he was Ram Prakash. Thereafter, the secret informer left the place.

5. The police then crossed the road and apprehended the Appellant at around 3 pm. At that time the Appellant was sitting on three bags.

6. PW-9 stated that he gave notice under Section 50 NDPS Act to the Appellant (Ex.PW4/A), whereby he conveyed to the Appellant that he had information that the Appellant was possessing ganja and further informed him that he has a legal

right to have his search conducted before any Gazetted Officer or Magistrate. PW-9 also informed him that the Appellant could take a search of the raiding party as well as their vehicle before his personal search was conducted. The Appellant had refused all of the above. Accordingly, PW-9 wrote the said reply on the notice, read over the contents and thereafter the Appellant put his signatures thereon (Ex.PW4/B). PW9 stated that some public persons had gathered at the spot. He requested 5-6 persons to join the proceedings, but they declined.

7. On opening of three bags, PW-9 found grass and seed like material and on smelling it he came to know that it was ganja. Each of the bags were weighed and found to be containing 40 kg ganja including the weight of bags. PW-9 then took two samples of 250 gm from each of the bags. They were kept in two separate transparent polythene bags tied with rubber band and then kept in two separate cloth parcels and were given Marks A and B. The remaining ganja was kept in a separate bag and tied with cloth patti. All the three bags were tied and were given the Marks C, D and E. PW-9 affixed the seal of 5APS NB Delhi on all the five cloth parcels including the FSL form. The seal after use was given to PW-2. Two seizure memos (Ex.PW4/C) were prepared. PW-9 also prepared a tehrir (Ex. PW-9/A) and handed over the original tehrir with the five sealed parcels, FSL form, carbon copy of seizure memo to PW-4 to produce it before DO for registration of the case.

8. At around 7 pm, PW-4 left the spot and returned to Police Station (PS) Crime Branch, Nehru Place with driver Rajesh in a government vehicle. At around 9.20 pm, Sub-Inspector (SI) Rajbir Singh (PW-6) reached the spot. PW-9 handed over the custody of the Appellant and the documents to PW-6. PW-6 prepared a site plan (Ex. PW-6/A) at the instance of PW-9. At around 11.15 pm, the Appellant was interrogated by PW-6. The Appellant is stated to have made a disclosure statement (PW-6/D) and thereafter the arrest and personal search memos (Ex.PW-6/B&C) were prepared. The raiding party finally left the spot at 11.45 pm and reached at Crime Branch office about half an hour past midnight. PW-9 gave a report to his superior under Section 57 NDPS Act regarding seizure of ganja on 5th June 2011 (Ex. PW-9/B). On 8th June 2011, PW-6 sent the sealed sample to the FSL and recorded the statement of the witnesses.

9. The Appellant was charged for the offence under Section 20 (b) (ii) (C) NDPS Act. The prosecution examined ten witnesses. When the evidence was put to the Appellant under Section 313 of the Code of Criminal Procedure (Cr PC) he denied it and claimed to have been falsely implicated. He stated that nothing had been recovered from him and the case property had been planted on him. He stated that he was lifted by the police on 4th June 2011 from his tea stall at G.T. Karnal Road. The defence evidence 10. The Appellant examined his wife Sunita as DW-1. She stated that at around 6 am, on 4th June 2011 when the Appellant was at his residence, a telephone call was received from one Teju who asked her husband to meet him. The Appellant refused and after attending the call went to his tea stall. Thereafter, at the tea stall he received a phone call from a person namely, Usir who asked the Appellant to meet him. The Appellant again expressed his inability to do so. At around 7 am, the said Teju along with a police official, Charan Singh, took the Appellant from his tea stall to the Crime Branch. First, the police officials brought the Appellant to his residence but nothing was recovered there. He was then taken back to the Crime Branch.

11. DW-1 stated that the police official snatched the Appellants mobile phone. The next morning police official Charan Singh called DW-1 to the Crime Branch where the said Charan Singh demanded Rs.2-3 lakhs to release the Appellant. DW-1 managed to arrange Rs.70,000 and gave it to Charan Singh who then stated that nothing could be done with such a meagre amount. He nevertheless took the money and stated that they would try to weaken the case against the Appellant. In her cross-examination DW-1 stated that she did not make any complaint to the higher police officials as she was illiterate. She also did not make any complaint about the demand made by Charan Singh or the fact that he took Rs.70,000 from her. The judgment of the trial Court 12. The trial Court in concluding that the Appellant is guilty of the offence under Section 20 (b) (ii) (C) of the NDPS Act came to the following conclusions: (i) The evidence of PW-9 showed that the secret information recorded in DD No.14 was handed over to PW-10 and then received in the office of the ACP as spoken to by PW-2. It, therefore, could not be said that Section 42 NDPS Act was not complied with. (ii) Since it was not the case of the prosecution that the Appellant was coming by train from Bihar or U.P. but that he was coming to the Old Delhi Railway Station, there was no necessity of

any rail ticket being found on the personal search of the Appellant. (iii) The failure to prepare the FSL form in triplicate was only an irregularity and did not affect the truthfulness of the case of the prosecution. (iv) Merely because the source and destination of the narcotic substance had not been proved by the prosecution did not make the case of the prosecution unreliable or untrustworthy. (v) The failure to associate independent witnesses in the arrest and search of the Appellant was not fatal to the case of the prosecution. Efforts were made by the raiding party but none was willing to join. (vi) The failure to produce the log book of the vehicle in which the raiding party set out did not falsify the case of the prosecution. It was at best an irregularity. (vii) There is no evidence to show that there was tampering of the seal and therefore the case of the prosecution did not become doubtful only because PW-8 did not state when he returned the seal to the IO. (viii) Since DW-1 had not lodged any complaint against the false implication of her husband or in respect of the alleged demand of Rs.2-3 lakhs as alleged, the plea of the Appellant that he had been lifted from the tea stall was not proved. Compliance with Section 42 NDPS Act 13. It was first submitted by Mr. Naveen Gaur, learned counsel for the Appellant, that there was non-compliance of the requirements of Section 42 (2) of the NDPS Act. The superior officer ACP Mohd. Iqbal was not examined by the prosecution. The secret information was itself not reduced to writing. What was placed before him was only the DD entry on which he made an endorsement. Further PW-9 was not authorised to conduct the raid. In reply it was submitted by Mr. Rajat Katyal, learned APP for the State, that in the present case since the seizure took place from a public place and not from an enclosed building, conveyance or enclosed space, Section 42 (2) NDPS Act did not apply. Secondly, it was submitted that any police officer (other than a peon, sepoy or constable) could be empowered either by the Central Government or the State Government for the search and arrest of any person whom he has reason to believe is in possession of any narcotic or psychotropic substances. Relying on the decision in *G. Srinivas Goud v. State of AP*, (2005) 8 SCC183 he submitted that the requirement applies only to non-gazetted officers as is evident from a reading of Section 41 NDPS Act.

14. A perusal of the record of the present case shows that only a DD No.14 was made of the secret information received by PW-9. PW-2 states that the said DD

entry was received in our office that is the office of ACP, Narcotics Cell, forwarded by SHO, Narcotics Cell in compliance to Section 42 NDPS Act.

From the evidence of PW-10 it appears that PW-9 is the person whom the secret informer first met. PW-9 stated that he recorded the DD entry at around 2 pm and gave it to PW-10. The evidence of PW-10 confirms that PW-9 did pass on the information to him and he in turn conveyed it to telephonically to the ACP. The DD entry seems to have been forwarded to ACP, Narcotic Cell (Ex. PW-2/A) and bears the seal of the office of the ACP with diary No.996 and has been signed by the ACP. Therefore, although the secret information was not separately reduced into writing, the requirement of Section 42 (2) NDPS Act was substantially complied with.

15. Even if Section 42 did not apply since the recovery was made from a public place, Section 43 NDPS Act would apply. Under that provision any officer in any of the departments mentioned in Section 42 can take action to search or arrest a person believed to be in possession of narcotic drug in any public place. For the purposes of Section 43 an officer authorized in terms of Section 41(2) read Section 42 (2) NDPS Act can undertake the search and arrest. PW-9 is a police officer above the rank of a constable and could have undertaken the search and arrest. Consequently, it cannot be said in the present case that there is a failure to comply with the requirement of the law. Failure to associate independent witnesses 16. Mr. Gaur pointed out that while the Appellant was apprehended around 3.30 pm, the formal arrest was recorded at 11 pm i.e. after eight hours. Throughout this period the police remained present at the spot and yet they could not get a single public witness to be associated.

17. This is perhaps the weakest link in the entire case of the prosecution. In his evidence PW-9 stated that he requested 5-6 public persons to join the proceedings but they did not join the investigation.

It is not clear who those public persons were. Their names were not noted. In his cross-examination PW-9 stated:

People who were managing the parking were present in the parking. I did not call any person from the parking, any employee of the Railway and the police officials deployed there to join the proceedings.

18. It seems extraordinary that although PW-9 and the entire raiding party remaining at the spot i.e. the parking lot of Old Delhi railway Station, well beyond 11.15 pm, i.e., nearly eight hours (they ultimately left the spot at 11.45 pm to reach the Crime Branch at 12.30 am) they were unable to locate a single public witness including any railway official or any personnel of any other security force to be associated in the proceedings.

19. The trial Court has referred to the decision in *Ajmer Singh v. State of Haryana* 2010 (2) RCR (CrI) 132 to hold that the failure to associate independent witness is not fatal to the prosecution case, as long as it is shown that efforts were made and none was willing. However, it is seen that in the said decision the Supreme Court emphasised that it had to be shown that after making efforts, which the Court considers in the circumstances of the case reasonable, the police officer was not able to get public witnesses to associate with either the raid or the arrest of the culprit. In other words in every case it will have to be examined whether serious efforts made by the police to associate public witnesses. In *Ram Swaroop v. State (Govt. NCT of Delhi)* (2013)14 SCC235 the Supreme Court found the evidence of the police witnesses "absolutely unimpeachable" and therefore held that the failure to associate independent witnesses did not affect the prosecution case. However, as will be seen hereafter, that cannot be said of the prosecution witnesses in the present case.

20. In the present case as already noticed the entire raiding party remained at the Old Delhi Railway parking lot which is an extraordinarily busy area from around 3.30 pm till midnight. This is a place where apart from security personnel, there are bound to be parking attendants and railway employees as well. The IO in his cross-examination has admitted that he did not make any effort to associate any such member of the security forces (including the railway forces, parking attendants or railway employee). In other words no sincere effort was made.

21. It has almost become a routine practice for the police to state that passersby were asked to join and they declined and went away without disclosing their names. The Court should be wary of readily accepting such explanations. In a case where a raid takes place in broad daylight in a busy area, a more convincing explanation has to be offered why despite remaining at the spot for about eight hours the police did not find a single public witness to join the proceedings. Shoddy investigation

22. The site plan presented to the Court by the prosecution was most rudimentary. The place of apprehension was supposed to be the parking lot of the Old Delhi Railway Station in the afternoon at 3.30 pm and yet, there are no photographs, and importantly no scaled plan which would show the relative positions of the Appellant, the bags, the raiding party and where the paperwork is supposed to have taken place with some precision. What has been presented to the Court is an imprecise kind of site plan which even does not remotely resemble the railway parking lot of the Old Delhi Railway Station. Learned APP offered a weak explanation states that the raiding party is not given any specific training in preparing site plans and make best of the available resources. The Court can only observe that with so many technological advances where satellite imagery to the smallest degree of precision of any location in the world is available, the Delhi police can no longer be excused for not improving its methods of gathering and presenting evidence. Considering that the raid was going to take place in a busy place like the Old Delhi Railway Station parking lot, and in broad daylight, it should have been possible for the police to arrange for a videograph of the place or perhaps of the raid itself, if not photographs.

23. Also clearly there are CCTV cameras all over the place outside the Old Delhi Railway Station including its parking lot. There was no effort made to collect the CCTV footage of the relevant time. Not only would it have showed how the Appellant reached the spot with the three bags but also it could have been placed on record to show the raid placed on record to shown the raid as it took place.

24. It is also in the above context with the failure to produce the log book for the movement of the vehicle of the raiding party and the failure to examine the driver Rajesh assumes significance. There should have been no difficulty at all in producing such evidence if indeed the raiding party moved to the spot from their

office in a government vehicle driven by Constable Rajesh Kumar. The prosecution case is not believable 25. There are other features of the present case that persuade the Court to view the failure by the prosecution to associate public witnesses with suspicion. In the first place, it appears unlikely that those involved in dealing with huge quantities of ganja, in this case 120 kg, would choose a busy spot like the parking lot of Old Delhi Railway Station and that too during the busy hours of the afternoon to collect and pass on such a huge consignment without expecting to be noticed or at least raise suspicion. Secondly, the secret information only gave the name of a person with an incomplete address without even broadly describing his features or some marks of identification which could then be verified. Thirdly, it is inconceivable that a single individual operating all by himself could take delivery of a consignment of 120 kg and then pass it on to anyone. In this case there is a total failure by the police to even try and investigate who was behind the particular transaction. Clearly, the Appellant could not be acting by himself if he was going to collect 120 kg of ganja at the Old Delhi Railway Station. Unless he was a weightlifter of sorts, he could not be expected to be carrying the entire stock himself. Fourthly, even if the prosecution story is to be believed, the Appellant was obviously waiting for someone. In fact it is stated that when the raiding party reached there he was found sitting on the three jute bags of ganja. How he managed to bring those bags to that point is also not clear. Equally unclear, is to whom was he going to deliver the consignment. And then, who is the original supplier and where is the consignment coming from?. In other words, there are too many loose ends in the story which was required to be tied up by the prosecution in order to present a convincing and probable case.

26. In similar circumstances, this Court in Mool Chand Yadav v. State 2013 X AD (Delhi) 10 doubted the case of the prosecution. There the Appellant was charged with possessing a plastic containing 20kg opium near a bus stand in Dhaula Kuan. There again the Court found:

It is unclear as to, to whom the opium was to be supplied and if so at which place. No investigation was conducted as to with whom the appellant used to remain in contact for the supply of huge quantity of contraband. The source from where the contraband used to be arranged or procured was not investigated. At the time of

apprehension of the accused on 11.11.2008 at 10.30 AM, no independent public witness was associated. It is not clear as to which place/destination the appellant was proceeding on foot after alighting from the bus to supply opium. No individual came near the place of apprehension to collect the consignment. No incriminating document was found in the appellants possession."

27. Learned APP has shown the Court the link evidence to demonstrate that there was no possibility of the samples being tampered with till the time they were sent to the FSL for testing. Even if the FSL form bearing the facsimile of the seal was not available on the judicial file, the fact of the FSL form being handed over to the FSL has been proved. However, the link evidence only goes to show that what was found in the three jute bags was ganja. It does not relieve the prosecution of the burden of conclusively showing that it was the Appellant who was found in possession of the consignment. Conclusion 28. The case of the prosecution cannot be said to have been proved against the Appellant beyond all reasonable doubt. On the evidence before the Court, the benefit of doubt ought to be given to the Appellant. Accordingly, the Appellant is acquitted of the offence under Section 20 (b) (ii) (C) NDPS Act. The impugned judgment and the order on sentence passed by the trial Court are set aside.

29. The appeal is allowed. The Appellant shall be released forthwith unless wanted in any other case. The bail bond and the surety bond furnished by the Appellant shall remain in force for a period of three months in terms of Section 437A Cr PC. A certified copy of this judgment be delivered forthwith to the Jail Superintendent for being handed over without delay to the Appellant. S. MURALIDHAR, J.

December 10, 2014 mg

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