

Sunil Kumar Vs. State

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Court : Delhi

Decided On : Dec-24-2010

Judge : P.K.Bhasin, J.

Acts : Narcotics Drugs and Psychotropic Substances Act, 1985 - Sections 20, 50, 27, 20(b)(ii)(B); Code of Criminal Procedure (CrPC) (Cr.P.C) - Section 313

Appeal No. : Crl. Appeal 807 OF 2007

Appellant : Sunil Kumar

Respondent : State

Advocate for Def. : Mr. Pawan Behl, Adv.

Advocate for Pet/Ap. : Mr. V.K. Malik, Adv.

Judgement :

This appeal is against the judgment of conviction of the appellant under Section 20 of the Narcotics Drugs and Psychotropic Substances Act, 1985 (NDPS Act in short) by the Additional Sessions Judge vide judgment dated 25th August, 2007 and sentence of rigorous imprisonment for eleven years and a fine of Rs. 1,00,000/- with a default stipulation awarded to him vide order dated 29th August, 2007.

2. The brief facts of the case are that on 11.10.01 Sub-Inspector Rohtash(PW-9) along with Head Constable Ashik Ali(PW-12), Constable Arvind Kumar(PW-2),

Constable Rohtash Kumar(PW-7) and Constable Sunder Lal(PW-8), all of whom were posted at Bhajanpura police station, were checking vehicles and pedestrians at night time at 66 foota road, near MCD office, C-12 Yamuna Vihar, Delhi. At about 9.15 p.m. one person(accused-appellant Sunil Kumar) was seen by Sub-Inspector Rohtash Kumar coming from Seelampur side. He was carrying a yellow coloured polythene bag in his hand. On seeing the police picket that person started moving back. The police officials got suspicious and so that person was apprehended by Sub-Inspector Rohtash Singh and constable Sunder Lal after chasing him and then on enquiry his name came to be known as Sunil Kumar. The polythene bag in the hand of Sunil Kumar on being searched was found to contain a black coloured polythene bag in which four packets/slabs of some black coloured material in a transparent polythene packet (panni) out of which one packet of slab was broken from one side were also found. SI Rohtash on smelling that material found it to be charas. The total weight of all the four packets was 1.8 kgs and out of that quantity 100 gms. was taken out as a sample for being sent to FSL and the same was kept in a pulanda which was sealed with the seal of RS. The SHO of the area was on patrolling duty at that time and on being informed about that recovery of charas he had also reached the spot and he also put his seal of CSR on the pulanda of the sample charas. Remaining charas was sealed in a separate pulanda which was also sealed with the seals of RS and CSR. Sunil Kumar was given a notice under Section 50 of the NDPS Act before his personal search to find out if he was carrying more charas also but he declined to be searched before a gazetted officer or any Magistrate since already charas had been recovered from him. Thereafter his person was searched but nothing incriminating was found. Necessary paper formalities, like preparation of seizure memos, filling up of FSL form etc were completed at the spot. The accused was arrested. The sample of 100 gms. sealed at the spot was later on sent to the FSL where on being tested by PW-1, Sr. Scientific Officer, the sample material weighing 100 gms. was confirmed to be charas.

3. The accused-appellant was tried for the commission of offence punishable under Section 20 of the NDPS Act. To prove its case against the accused the prosecution had examined twelve witnesses all of whom, except PW-1 who, was the Sr. Scientific officer from Forensic Science Laboratory(FSL), were police

officials. When examined under Section 313 Cr.P.C. the accused denied all the allegations levelled against him and pleaded that he was lifted from his house on the pretext of some inquiry and was later on implicated in the present case. Learned trial Court after examining the evidence adduced by the prosecution convicted the appellant under Section 20 of the NDPS Act for possessing commercial quantity of charas.

4. Feeling aggrieved, the convicted accused filed the present appeal.

5. I have heard learned counsel for the appellant and the learned Additional Public Prosecutor for the State and have also given thoughtful consideration to the submissions made by them with regard to the evidence adduced by the prosecution and the findings of the learned trial Judge.

6. Learned counsel for the appellant did not raise any serious challenge to the findings of the learned trial Court as far as the apprehension of the accused in the manner claimed by the prosecution is concerned. That fact has been found by the trial Court to have been duly established from the evidence of police witnesses against none of whom any kind of motive for false implication was attributed in their cross-examination. I have also gone through the evidence of the police witnesses who were members of the checking team at the time of the apprehension of the accused on 11th October, 2001 and I find myself in full agreement with the decision of the learned trial Judge in this regard. I also find that the evidence of the police witnesses in respect of the recovery of a polythene bag containing four slabs/packages, which according to the case of the prosecution were slabs/packages of charas was fully reliable. Although the prosecution had examined as many as seven police officials but I need not refer to the evidence of each one of them and it would be sufficient to narrate the evidence of the head of the checking team since his other colleagues have all supported his version. PW-9 SI Rohtash was heading the checking team at the time of apprehension of the accused. PW-9 had deposed that on 11-10-01 he along with one Head Constable and some constables was on duty for checking of the vehicles at 66 Foota Road. At about 9.15 pm. the accused was seen coming from the side of Seelampur with a yellow coloured polythene in his hand. On seeing the police the accused took a

sudden turn. On suspicion, he was apprehended and on the search of the polythene carried by him it was found containing a black coloured polythene in which there was a transparent polythene having four packets of charas which were slabnuma. The SHO was informed who came at the spot and in his presence the charas was weighed and its weight was found to be 1 Kg. 800 gms. out of which one sample of 100 gms. was taken out and remaining charas with polythene was separately sealed with the seal of RS and CSR of the SHO. A notice under Section 50 of the NDPS Act was served on the accused and his reply was obtained. He further deposed that public persons were requested to join the proceedings but none had agreed. FSL form was filled up and the afore-said seals were affixed on it.

7. This version of PW-9 was fully corroborated on all material aspects by his other colleagues who were members of the checking team. I have also gone through the cross-examination of each one of the police witnesses examined by the prosecution to establish the apprehension of the accused and recovery of the four slabs/packets containing charas from the yellow coloured polythene bag which he was carrying with him in his hand at the time of his apprehension and I find that nothing could be elicited from anyone of them which could have introduced any kind of doubt in the mind of the Court regarding their credibility and reliability and it was not even attempted by the accused to show that he was lifted from his house by the police.

8. Learned counsel for the appellant had not disputed that the sample material weighing 100 gms., which was sent to FSL, was charas. That fact is even otherwise duly established from the testimony of PW-1 Ms. Madhulika Sharma who had tested that material and had found the same to be charas. She proved her report Ex. PW-1/A which also shows that she had received the parcel with seals intact and tallying with the specimen impressions of the seals forwarded by the police. She had stated so in her evidence also during the trial. She was not cross-examined at all on behalf of the accused.

9. Learned counsel for the appellant, however, submitted that even though the prosecution case was that four slabs/packets allegedly containing charas weighing

1kg. 800 gms. were recovered from the possession of the accused but only 100 gms. of the recovered substance and that too only from one of those slabs/packets only was taken for being tested in the FSL to confirm whether that material actually was charas or not and no substance from the other three slabs/packets was sent for testing purposes to FSL and consequently it could not be said that the prosecution had been successful in establishing the recovery of commercial quantity of charas from the possession of the accused. Therefore, counsel contended, the learned trial Court was not justified in coming to the conclusion that commercial quantity of 1.800 kgs. of charas was recovered from the possession of the accused and further that at the most the recovery could be said to be of intermediary quantity i.e. more than small quantity of 100 gms. and less than the commercial quantity of 1 kg., as provided in the relevant notification issued by the Government. In this regard, my attention was also drawn to the evidence of PW-8 HC Sunder Lal who had admitted in his cross-examination that sample from only one slab was taken and other three slabs had remained intact. My attention was also drawn to the seizure memo Ex. PW-7/A which had been prepared by the head of the checking team, PW-9 Sub-Inspector Rohtash, wherein it had been clearly mentioned that out of the four packets recovered from the accused 100 gms. of charas was taken from one packet only as sample and the remaining substance had been sealed in a separate pulanda. Learned counsel also cited one judgment of the Supreme Court in "Gunter Edwin Kircher vs. State of Goa, Secretariat Panaji" reported in (1993) 3 SCC 145 wherein the Supreme Court had observed that if out of more than one packets of charas recovered from some person sample of the substance for being chemically tested is taken from only one packet and not from the remaining it cannot be said that the remaining packet(s) also contained charas in the absence of expert evidence. The Supreme Court had rejected the submission made on behalf of the State that there was no need to send the entire quantity for chemical analysis and the fact that one of the pieces which was sent for analysis had been found to contain charas the necessary inference would be that the other piece also contained charas. The Supreme Court had also observed that:

". .. the concerned authorities would do better if they send the entire quantity seized for chemical analysis so that there may not be any dispute of this nature

regarding the quantity seized. If it is not practicable, in a given case, to send the entire quantity then sufficient quantity by way of samples from each of the packets or pieces recovered should be sent for chemical analysis under a regular panchnama ."

In that case two pieces of charas weighing 7 gms. and 5 gms. respectively were recovered from the accused but only one of the pieces weighing less than 5 gms. was sent for chemical analysis and no part of the other piece was sent. The Supreme Court, therefore, held that the prosecution could be said to have established recovery of that much quantity of charas from the accused. In the facts of that case the Supreme Court had also come to the conclusion that that much quantity found from the accused was meant for his personal consumption and not for sale or distribution and accordingly his conviction under Section 20(b)(ii) was converted to one under Section 27 of the unamended NDPS Act and the sentence of ten years imprisonment was reduced to six months while maintaining the fine of rupees one lac imposed by the trial Court.

10. Learned additional public prosecutor could not successfully refute this factual position highlighted by the learned counsel for the appellant though he maintained that sample of charas was taken from each one of the four packets. He perhaps wanted this Court to presume that sample from all the four packets must have been taken by the police following the Supreme Courts decision in the above referred judgment cited on behalf of the appellant. However, in criminal appeals the Court is not expected to take a decision on presumptions and surmises and prosecution is expected to establish its case beyond all reasonable doubts which in the present case has not been done as far as the quantity recovered from the accused is concerned. In view of the said judgment of the Supreme Court, the submission made on behalf of the appellant by his counsel deserves to be accepted and it has to be held that the recovery of charas from his possession was of intermediary quantity, possession of which is punishable under Section 20(b)(ii)(B) of the NDPS Act. The learned trial Court without considering this aspect had come to the conclusion that the recovery of charas from the accused was of 1.800 gms. Thus, that conclusion cannot be sustained by this Court.

11. In the result, this appeal is partly allowed. The conviction of the appellant is converted from Section 20(b)(ii)(C) of the NDPS Act to Section 20(b)(ii)(B) and the sentence of imprisonment for eleven years awarded to him by the trial Court is reduced to ten years while the sentence of fine is maintained. This appeal stands disposed of accordingly.

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