

Sunil Chaudhary Vs. State

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Court : Delhi

Decided On : Jan-19-2012

Appellant : Sunil Chaudhary

Respondent : State

Judgement :

* IN THE HIGH COURT OF DELHI AT NEW DELHI + CRL.APPEAL No.908/2004
% Judgment reserved on : 14th November, 2011 Judgment delivered on: 19th January, 2012 SUNIL CHAUDHARY Appellant Through: Mr.Manu Sharma, Adv. versus STATE Respondent Through: Ms.Rajdipa Behura,APP with Inspector Surender Singh, police station Old Delhi Railway Station in person.
CORAM: HON'BLE MR. JUSTICE SURESH KAIT SURESH KAIT, J..

1. Instant appeal is being filed on behalf of appellant from Jail to assail the impugned judgment dated 26.08.2004 whereby learned Additional Sessions Judge, Special Court under NDPS Act, Delhi held guilty of the offence under Section 20 of the NDPS Act for possessing 9 KGs of charas in contravention of the Act; and vide order on sentence dated 28.08.2004, he was sentenced to undergo rigorous imprisonment for a period of ten years and fine of ` 1.00Lacs (Rupees One Lac only) under Section 20 (c) of NDPS Act..

2. The case of the prosecution in brief is that on 02.04.2003, ASI Ashok Kumar, HC Ayjaj Khjan, Ct.Ajay and Ct.Mahender were on patrolling duty and were present at East Passenger Hall, Old Delhi Crl.Appeal No.908/2004 *Page 1 of 13*

Railway Station. At about 09:00PM, secret information was received by ASI Ashok Kumar that a young man was standing at East Passenger Hall, near prepaid booth and was having cloth bag which contains charas and he was awaiting for somebody. If raid is conducted immediately, then he could be apprehended. This information was conveyed to other members of police party by ASI Ashok Kumar and he also requested 5 or 6 passengers and disclosed them the secret information and asked them to join the raiding party. One person namely, Mohd. Liyakat son of Irfan, r/o H. No.86, Gali No.9, Khajoori Khas, Delhi of his own free will came forward to join the raiding party. Without waiting further, ASI Ashok Kumar organised a raiding party of police officials and above named public person and the secret informer..

3. At about 09:15PM, secret informer pointed towards a young man who was standing near prepaid booth containing a cloth bag in his right hand. The said person on seeing the police party started walking. He was stopped by ASI Ashok Kumar and his name revealed as Sunil Chaudhary s/o Shri Jugal Prasad, r/o Mohalla Machali Bazar, Thana Sadar, District East Champaran, Bihar. The said ASI told him that as per his information, he was having charas in his possession. He also informed that he was within his legal right to give his search before a gazetted officer or Magistrate by calling them at the spot or he could be produced before them. Accordingly, notice under Section 50 NDPS Act was given the appellant. He refused to be searched before a Magistrate or gazetted officer. In the meanwhile, at about 09:30PM, SHO, Jai Kishan, Railway Main Delhi also reached at the spot and ASI Crl.Appeal No.908/2004 *Page 2 of 13* Ashok Kumar briefed him. ASI offered the search of the raiding party to the appellant, who refused the same. However, ASI gave his search to Ct. Ayjaj Khan, but nothing incriminating was recovered..

4. In the presence of all the members of raiding party, above named persons, ASI and SHO took the search of the bag of the appellant and on checking the same, charas was found in white plastic. On weighing, it came out 9 KGs. Out of which, 1 KGs was separated as sample and the remaining charas were converted into pullands. FSL form was filled up. Seals of AP and JK were affixed on both the pullands. Thereafter, both the pullands and FSL form and copy of seizure memo

were handed over to SHO Jai Kishan who took the same to the police station for depositing the same into Malkhana. Rukka was prepared at the spot and was sent to the police station through Ct.Mahender. On the basis of the said rukka, instant case FIR was registered..

5. Further investigations were handed over to SI Arjun Singh, who reached at the spot. ASI Ashok Kumar handed over the documents prepared by him as well as appellant to SI Arjun Singh, who in turn prepared the site plan Ex.PW7/A and also recorded statement of ASI. SI Arjun Singh received the copy of FIR through Ct. Mahender. Thereafter, he arrested the appellant vide memo Ex.PW3/B and his personal search was conducted vide memo Ex.PW3/C..

6. Sample parcel alongwith FSL form were sent to FSL, Malviya Nagar, Delhi vide RC No.7/21 and on further investigation, it culminated into filing of charge-sheet against the appellant. Crl.Appeal No.908/2004 Page 3 of 13.

7. After complying with procedural formalities and hearing the matter on the point of charge, vide order dated 19.07.2003, learned Additional Sessions Judge, opined and framed a charge under Section 20 NDPS Act against the appellant. Appellant pleaded not guilty and claimed trial..

8. To substantiate the allegations against appellant, prosecution has examined as many as ten witnesses. Out of these ten witnesses, PW3 Mohd. Liaykat, PW5 Ct.Mahinder, PW6 Inspector Jai Kishan and PW9 ASI Ashok Kumar were the recovery witnesses..

9. Statement of the appellant under Section 313 Cr. P.C. was recorded wherein he denied his involvement in present case. According to him, he is innocent and has been falsely implicated by the police, however has not led any evidence in his defence..

10. PW3 Mohd. Liaykat is a public witness and PW5 Ct.Mahender and PW9 ASI Ashok Kumar, first IO of this case. The above named both police witnesses made identical deposition narrating even leading to the arrest of appellant and recovery of 9 KGs charas from his possession..

11. PW5 Ct.Mahender and PW9 ASI Ashok Kumar on 02.04.2003 have deposed that they were on patrolling duty alongwith HC Ajyaj Khan and Ct.Ramesh and were present at East Passenger Hall at about 09:00PM..

12. Mr.Manu Sharma, learned counsel for appellant while arguing the matter on 20.10.2011 has submitted before this Court that on Crl.Appeal No.908/2004 *Page 4 of 13* instructions, he would confine his arguments only one aspect i.e. 'Whether the samples were un-tampered and were in safe custody?.

13. To this effect, Mr.Sharma, learned counsel has submitted that the recovery of alleged charas weighing 9 KGs was affected from the appellant on 02.04.2003. He has referred to deposition of PW2 HC Kunji Lal, who deposed that on 17.04.2003, he sent one sealed parcel and FSL form to FSL, Malviya Nagar, New Delhi with seals intact vide RC No.107/21 (in fact RC No.7/21 as mentioned at various places in report under Section 173 Cr. P.C as well as statement of witnesses under Section 161 Cr. P.C.) through Ct.Sudhir Kumar. The aforementioned Ct. handed over to him receipt copy of the RC after depositing the case property..

14. I note, this witness has not been cross-examined..

15. Learned counsel has further referred to the deposition of PW8 Ct.Sudesh Singh, who has deposed that on 17.04.2003 he was posted at RMD. SI Arjun Singh summoned him and asked to take the sample parcel and FSL form pertaining to this case to FSL, Malviya Nagar, New Delhi. MHC(M) Kunji Lal gave him one sealed parcel and one FSL form having seals of AP and JK respectively. He deposited the parcel and FSL form at FSL, Malviya Nagar, New Delhi vide RC No.7/21. After depositing the same, he handed over the receipt copy of the RC to MHC(M)..

16. He further referred to Road Certificate No.7/21 Ex.PW2/B wherein interpolation has been made at three points as '16/4/03 to Crl.Appeal No.908/2004 *Page 5 of 13* 17/4/03'. Therefore, he has pointed out that there were all possibilities that the police had tampered with the samples. Otherwise, there was no point to interpolate in the dates as mentioned above..

17. It is further pointed out by learned counsel that nowhere it is mentioned that 'FSL Form' was also sent along with the sample parcel as mentioned above. However, in the absence of 'FSL Form', which is mandatory requirement, the samples sent by police to FSL, Malviya Nagar, New Delhi create suspicion that the samples were not intact..

18. Learned counsel has further referred to Ex.PW7/B, the FSL report dated 20.05.2003 wherein there is no mentioning of 'FSL Form'..

19. He submitted that the alleged recovery of the charas was affected from the appellant on 02.04.2003 and as deposed by PW8 Ct.Sudhir Kumar and PW2 HC Kunji Lal was sent vide RC No.7/21 Ex.PW2/B on 17.04.2003..

20. Learned counsel has also pointed that PW5 Ct.Mahender, PW6 Inspector Jai Kishan and PW7 SI Arjun Singh have deposed that the alleged recovery of charas affected from Paharganj side (West Side), whereas PW3 Mohd.Liyakat - a public witness deposed that on 02.04.2003 he was present on 02.04.2003 at Old Delhi Railway Station to see his cousin brother. AT about 09:00PM, he was standing at East Passenger Hall, which was near to scooter parking and 3-4 police officials met him. Whereas, one person was standing near prepaid booth, who was having bag with him. PW9 ASI Ashok Kumar deposed that on 02.04.2003 he alongwith other staff members were on Crl.Appeal No.908/2004 *Page 6 of 13* patrolling duty and were present at East Side Passenger Hall and at about 09:00PM, he received secret information that a person was present near prepaid booth at West Passenger Hall, who was having a bag with him, which was containing charas..

21. Learned counsel for appellant has further asserted that PW9/ ASI Ashok Kumar has admitted that no ticket was obtained from PW3 Modh. Liaykat. It proves, the public witness PW3 is planted witness. If he was available at the spot, in the manner as projected by prosecution, the investigating officer would have seized the ticket from this witness..

22. He also drawn the attention of this Court to the document which is the copy of Store Room Register (Part-I) wherein 'FSL Form and sealed parcels with seal of AP and JK' have been added subsequently by a different pen, which create

suspicion..

23. Therefore, by summing up, learned counsel has argued that firstly, no 'FSL Form' was sent with the samples and the deposition of PW5, 6, and 7 is contrary to PW3 and .

9. Appellant is innocent and from the lower strata of society who has been wrongly booked in the instant case by police, for the reasons best known to them..

24. This Court previously in *Bijay v. State (GNCT of Delhi)* Criminal Appeal No.700/2005 rendered on 05.07.2011 = 2011 VI AD (Delhi) 562 has decided the similar issue in favour of the appellant, *inter - alia* holding as under:-.

20. Learned Amicus Curiae further submits that the "FSL Form" was to be sent along with the sealed parcel of the sample of Ganja. Further he Crl.Appelal No.908/2004 *Page 7 of 13* states that there was some interpolation in the Malkhana Register which is called as "Store Room Register" (Part-I) against entry No.91 wherein he noted that the words "And FSL Form" were subsequently added. Therefore, it proves that the FSL Form was not sent along with the sample taken. The Road Certificate dated 21.04.2003 also does not indicate any "FSL Form". Therefore, it further proves that no FSL Form was sent along with sealed sample..

22. Learned Amicus Curiae had relied upon the judgment of *Radha Kishan vs. State* 87 (2000) DLT 106 wherein in para 26 it was discussed that it is the normal procedure that when the incriminating articles are seized and are required to be sent to the CFSL, those articles are immediately sealed and deposited in malkhana at the police station till they are taken out and sent to the laboratory. However, 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 being done so because at the time of analysis of sealed parcels in laboratory, the analyst concerned is able to tally the seal impressions on sealed packets with those appearing on the "CFSL Form in order to rule out any possibility of tampering of seals or sealed packets after seizure, anywhere or in-transit, till receipt in laboratory. This is a safeguard to an

accused to ensure that no tampering has been done..

23. In para 29 of this judgment of Radha Kishan (supra), it was observed that in a large number of NDPS cases the prosecution has to establish that the "CFSL Form should be deposited in malkhana and thereafter be sent to the CFSL along with the seized sample; otherwise there is a strong Crl.Appeal No.908/2004 *Page 8 of 13* possibility of tampering with the seals of samples sent to CFSL..

24. Further, learned Amicus Curiae relied upon the judgment of Mool Chand vs. State 49 (1993) DLT 649 wherein in para 3, the main contention on behalf of the appellant was that the "CFSL Form although allegedly filled up at the spot, neither was deposited in the malkhana nor was it sent to the CFSL alongwith the sample and thus the very recovery of the opium becomes doubtful."

25. In Radha Kishan v. State 87 (2000) DLT 106 this Court has explained the importance of ensuring that the FSL form is duly sent with the sample for testing and held as under:- "26. It is 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 at the 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 the seal is put on a form, commonly called, the CFSL form. This is so done because at the time of analysis of sealed packets in the 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 tampering of seals on sealed packets after seizure anywhere or in transit till receipt in laboratory. The importance of the CFSL form thus cannot be overemphasized 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 Crl.Appeal No.908/2004 *Page 9 of 13* or forwarding note accompanying a sample sent by the police to the Forensic Science Laboratory. Such a form contains the nature of the 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."

(emphasis supplied).

10. In Radha Kishan(supra) , after referring to the Delhi High Court Rules, Part III Chapter 18 B, regarding proper proof of custody of articles, it was held by this Court that the evidence of preparation and dispatch of the FSL form was critical for ensuring that the sealed sample was kept intact in the police malkhana. An adverse inference would be drawn against the prosecution in the event the FSL form was not proved to have been prepared and dispatched. To the same effect are the judgments in Moolchand and Phool Kumar. Further, it has been held in Satinder Singh v. State (NCT of Delhi) 69 (1997) DLT 577, that oral evidence which is contrary to the documentary evidence ought not to be relied upon. In the instant case, despite the prosecution witnesses asserting that the FSL form was prepared, not only is the FSL form unavailable on the record but the photocopies of the store room register and road certificate throw considerable doubts whether the FSL form was in fact prepared and dispatched. These documents are unreliable. For the above reasons, it is held that in the instant case the noncompliance with the mandatory requirement of preparation and dispatch of the FSL form with the sample sent for testing is fatal to the case of the prosecution."

26. Ms.Rajdipa Behura, learned APP on the other hand submitted that for prosecuting the appellant in present case, sanction from the CrI.Appeal No.908/2004 *Page 10 of 13* DCP concerned was required, therefore, while getting the sanction, there was delay of 12 days in sending the samples to FSL, Malviya Nagar, New Delhi. The samples were intact and the delay so occurred in sending the samples, is not fatal to the prosecution case..

27. Learned APP has also referred the deposition of PW2 HC Kunji Lal, who has proved that on 17.04.2003, he has sent one sealed parcel and FSL form to FSL, Malviya Nagar, New Delhi with seals intact vide RC No.7/21 through Ct.Sudhir Kumar. This fact has also been proved by PW6 who deposed that IO affixed his seal of 'AP' on both the parcels. He affixed his seal JK on both the parcels. FSL form was also filled in and both seals i.e. AP and JK were put thereon. The seals after use were handed over to public witness. PW8 Ct. Sudhir Kumar has also proved that PW2 MHC(M) Kunji Lal gave him one sealed parcel and one 'FSL

Form' having seals of AP and JK. He deposited the parcel and FSL form at FSL, Malviya Nagar, New Delhi vide RC No.7/21..

28. Learned APP has further referred to the deposition of PW10 Dr.Madhulika Sharma, Assistant Director, FSL, Rohini, Delhi, who deposed that on 17.04.2003 she was posted as Senior Scientific Officer, FSL, Malviya Nagar, Delhi. On that date, one sealed parcel and one FSL form sealed with seals of JK and AP were received in the office. The seals of the parcel were tallied with the specimen seal impression affixed on FSL form and hence tallied with each other. She proved her report as Ex.PW7/B..

29. She further submitted that admittedly, the information regarding Crl.Appeal No.908/2004 *Page 11 of 13* the appellant who was present near prepaid booth at West Passenger Hall, however, the appellant was detained from West side, therefore, there was no discrepancy in the deposition of witnesses, as raised by learned counsel for appellant, regarding the place of arrest of the appellant. As per the deposition of PW9, ASI Ashok Kumar from the police station, they went to main hall, RMS office and then they reached East Passenger Hall. He has further deposed that the distance between the place of information and the place of apprehension, of the appellant is about 250-300 yards..

30. In view of above discussion, without commenting upon the method and tactics resorted to by the investigating agency in sending the case property, that too lacking the 'FSL form' or, for the glaring interpolation and discrepancy referred to by learned counsel for appellant in the records, it is clearly brought on record that there was some intentional or unintentional lapses on the part of the investigating agency for handling and sending the samples to the FSL for expert opinion..

31. After sealing the samples, the seal was handed over to one of the witnesses, which also creates doubt on the sample whether the samples, were intact and not tempered with..

32. I have perused the nominal roll dated 04.01.2011. The appellant has already undergone 07 years 09 months and 27 days and the unexpired portion of sentence is only 02 years 02 months and 27 days (IFP). Crl.Appeal No.908/2004

33. Putting the curtain down, in the above said facts and circumstances of the case, judgment dated 26.08.2004 and order on sentence dated 28.08.2004, whereby appellant was sentenced to undergo rigorous imprisonment for ten years and fine of ` 1.00 lacs (Rupees One Lac only) under Section 20 (c) of NDPS Act, is set aside..

34. Consequently, Criminal Appeal No.908/2004 succeeds and appellant be set at liberty forthwith, if not warranted in any other case..

35. Copy of order be sent to Jail Superintendent, for compliance..

36. No order as to costs. SURESH KAIT, J JANUARY 19, 2012 Mk Crl.Appeal No.908/2004 Page 13 of 13