

Aziz Vs. State

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Court : Delhi

Decided On : Apr-29-2013

Judge : Mukta Gupta

Appellant : Aziz

Respondent : State

Advocate for Def. : Mr. Manoj Ohri

Advocate for Pet/Ap. : Mr. Bhupesh Narula, Mr. Yash Tandon

Judgement :

* IN THE HIGH COURT OF DELHI AT NEW DELHI + % CRL.A. 8/2003 Decided on:

29. h April, 2013 AZIZ Through: Appellant Mr. Bhupesh Narula and Mr. Yash Tandon, Advocates with Appellant in person. versus STATE Through: Respondent Mr. Manoj Ohri, APP for the State with SI Neeraj Kumar, PS Welcome. CORAM: HON'BLE MS. JUSTICE MUKTA GUPTA MUKTA GUPTA, J (ORAL) 1. By the present appeal the Appellant impugns the judgment dated 9th October, 2002 whereby he has been convicted for offence under Section 20 NDPS Act and the order on sentence dated 10th October, 2002 directing him to undergo Rigorous Imprisonment for a period of ten years and to pay a fine to Rs. 1 lakhs and in default of payment of fine to further undergo Rigorous Imprisonment for a period of two years.

2. Learned counsel for the Appellant contends that as per the Rugqa Ex. PW3/D it is evident that search has already been conducted and giving of notice under Section 50 NDPS Act thereafter was meaningless. Even in a case of chance recovery when the search of the person has to be taken Section 50 of NDPS Act is required to be complied with. Reliance is placed on Dilip and another vs. State of Madhya Pradesh, AIR 2000 SC 369. Despite the fact that the alleged recovery was made at 3.45 p.m. in broad day light no public witness was associated. The samples were sent to the CFSL after a delay of 13 days. Single sample of 200 grams was taken from the entire alleged contraband of 1.2 kg. which is erroneous as samples from each batti ought to have been taken separately. The raid certificate was not produced in Court. The signatures of the officer taking the samples from the malkhana to the CFSL are not appended in the malkhana register. The FIR number is mentioned on all the documents like Section 50 notice and report under Section 52 NDPS Act. Thus it is clear that the FIR was registered prior to preparation of documents. No memo of handing over of the seals to the independent witness has been prepared. There is non-compliance of Section 57 NDPS Act as no person from the office of DCP has appeared and PW7 states that he is from the office of ACP (Operations). In view of these serious infirmities appeal be allowed.

3. Learned APP for the State on the other hand contends that Head Constable Kishan Pal deposited the sealed parcels and CFSL form along with personal search of the accused. On 22nd February, 2001 he sent the exhibits through Head Constable Tej Pal vide RC No. 20/21 for depositing the same to FSL Malviya Nagar and the samples and result were obtained from HC Ved Pal on 24th April 2001. The relevant entries in this regard are made in Register No.

19. It is not essential that the person who has taken the samples from the malkhana to the CFSL should sign the entries. HC Tej Pal who has taken the samples had been examined in the Court who has stated that as long as the case property remained in his custody it was not tampered and this witness has not been cross-examined. Since in the present case the recovery was a chance recovery and from a polythene bag in the hand of the Appellant compliance of Section 50 of NDPS Act was not required to be done. Reliance is placed on State

of Punjab vs. Baldev Singh, 1999 (6) SCC 172. PW3, PW8 and PW9 the members of the raiding party have clearly stated about the raid conducted. Despite the lengthy cross-examination nothing has been elicited from them. PW7 has proved the report under Section 57 of the NDPS Act which was sent on the next day itself, that is, within 24 hours on 31st January, 2001. PW9 has clearly stated that the seals were handed over to him thus ruling out the possibility of tampering. PW10 the SHO has categorically stated that he put the seals on the case property, sample and the CFSL Form. He stated that he put the FIR number on the relevant documents and deposited the sample parcel and form CFSL in malkhana. There is no merit in any of the contentions raised by the learned counsel. The appeal be dismissed.

4. I have heard learned counsel for the parties.

5. Briefly the case of the prosecution is that on 30 th January, 2001 while PW3 ASI Rajpal Sharma was on duty of checking vehicles at Jafrabad along with Head Constable Tej Pal, Constable Sukhram Pal and Constable Vinod they found a person coming from the side of 66 feet road holding a plastic bag in his right hand. On seeing the police party, the person tried to turn back which raised suspicious in their mind. Thus they apprehended him at around 3.45 p.m. During interrogation, the Appellant stated his name as Aziz and was identified as the person who was present in Court. His plastic bag was checked and it was found containing green colour polythene which in turn contained battinuma charas. Thereafter a notice under Section 50 NDPS Act was given to the Appellant vide Ex. PW3/A. However, the Appellant refused to avail the opportunity. Four-five public persons were requested to join the proceedings but none agreed. After serving the notice under Section 50 NDPS Act nothing further was recovered from the possession of the Appellant. The recovered Charas was weighed and found to be 1.2 kg. Out of the said contraband 200 gms were taken out as sample and sealed with the seal of JP which was of Head Constable Jai Prakash. Form CFSL was filled and seal was affixed thereon. After use, the seal was given to HC Jai Prakash. The case property was seized vide memo Ex. PW3/C and Ruqqa Ex. PW3/D was sent to police station through Head Constable Jai Prakash who also gave the case property, sample and CFSL form to the SHO, PS Welcome. The version of PW3

ASI Raj Pal Sharma is supported by PW8 Constable Vinod Kumar, the other member of the raiding team and PW9 Head Constable Jai Prakash. Head Constable Jai Prakash has further stated that he handed over the parcels, a copy of the seizure memo and CFSL Form to the SHO and Ruqqa to the Duty Officer. He further went back to the spot with a copy of the FIR and original Ruqqa. PW9 has further stated that the seals after use were handed over to him. Thus the seal did not remain in the possession of PW3 ASI Raj Pal Sharma. Further when the samples reached the CFSL, the seals were found to be intact and tallied with the specimen seal as on the CFSL form. PW7 Constable Sushil Kumar who had brought the original report under Section 57 of the NDPS Act proved the same vide Ex. PW7/A. Merely because that person at the time of evidence was posted in the office of ACP (Operations) does not mean that he did not give the report to the DCP, North East. He identified the signatures of the DCP, North East. Further this witness has not been cross-examined and thus his testimony has gone unchallenged.

6. As regards the compliance of Section 50 NDPS Act the Constitution Bench in *State of Punjab vs. Baldev Singh*, (supra) has held that compliance of Section 50 NDPS Act was mandatory however, the same was not possible in the case of chance recovery and when the contraband is not recovered from the personal search of the accused. Efforts were made by the raiding team to associate public witness however, nobody turned up and thus the non-association of public witness would not be fatal to the prosecution case. For delay of 13 days in sending the samples to the CFSL, no adverse inference can be drawn, as when the samples reached the CFSL the seals were found to be intact and tallied with the specimen seal impression.

7. Learned counsel for the Appellant has laid emphasis on the fact that no memo of handing over of the seals to an independent person has been prepared. The seal was of HC Jai Prakash which was duly affixed by the recovery officer PW3 and handed over back to him on the same date and immediately. Thereafter the SHO has also put his seals. There is nothing on record to suggest that the seals were tampered with because the sample, parcel and form CFSL were immediately deposited in the malkahan. The signing of the malkhana register while taking the

samples to the CFSL is not essential requirement. Further PW2 HC Tej Pal who had taken the samples to the CFSL has stated that he took the samples from moharar malkahana vide RC No. 20/21 on 22nd February, 2001 and handed over the receipt to him. He further stated that as long as the case property was remained in his custody there was no tampering. This witness has not been cross-examined. The report under Section 57 NDPS Act is also proved.

8. In view of the aforesaid discussion, I find no illegality in the impugned judgment of conviction. However, as regards the order on sentence, the Appellant has been awarded Rigorous Imprisonment for a period of ten years and fine of Rs. 1 lakhs which is the minimum prescribed. The sentence in default of payment of fine has been awarded as rigorous imprisonment for a period of two years which in my opinion is disproportionate and is liable to be reduced. A convict undergoes sentence in default of payment of fine because of his penury condition. A person cannot be punished due to his poverty. The order on sentence is thus modified to the extent that in default of payment of fine the Appellant will undergo Rigorous Imprisonment for one year. Appeal is disposed of. Copy of the judgment be sent to the Appellant through Superintendent, Tihar Jail. MUKTA GUPTA, J.

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