Dharambir Vs The State of Haryana

Court: High Court Of Punjab And Haryana At Chandigarh

Date of Decision: July 10, 2008

Acts Referred: Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) â€" Section 18

Citation: (2008) 27 CriminalCC 137

Hon'ble Judges: Sham Sunder, J

Bench: Single Bench

Advocate: Sanjay Vashisth, for the Appellant; A.K. Jindal, AAG, for the Respondent

Final Decision: Allowed

Judgement

Sham Sunder, J.
This appeal is directed against the judgment of conviction dated 18.02.1997, and the order of sentence dated

19.02.1997. rendered by the Court of Addl. Sessions Judge (II), Bhiwani, vide which it convicted the accused (now appellant), for the offence,

punishable u/s 18 of the Narcotic Drugs & Psychotropic Substances Act, 1985 (hereinafter called as "the Act" only) and sentenced him, to

undergo rigorous imprisonment for a period of ten years, and to pay a fine of Rs. 1 lac, and in default of payment of the same, to undergo rigorous

imprisonment for another period of one year, for having been found in possession of I Kg. opium (now falling within the ambit of non-commercial

quantity), without any permit or licence.

2. The facts, in brief, are that on 18.01.1994, Ranbir Singh, SI, the then Incharge, CIA Staff, Bhiwani, alongwith other police officials, was present

at railway crossing, Bamla to Rewari Khera, in connection with patrol duty, when the accused was noticed coming, on foot, from the side of village

Bamla, having a bag (thela), in his hand. He tried to turn back, but was apprehended, on suspicion. The search of the bag, being carried by the

accused, was conducted, in the presence of Yogender Nehra, DSP, who was called to the spot, by sending a VT message, as a result whereof, I

Kg opium, was recovered. A sample of 50 grams was separated, and put into a container. The remaining opium was also put into a separate

container. The containers, containing sample, and the remaining opium, were converted into parcels, duly sealed, and taken into possession, vide a

separate recovery memo. Ruqa was sent to the Police Station, on the basis whereof, formal FIR was registered. The accused was arrested. After

the completion of investigation, the accused was challaned.

3. On appearance, in the Court, the copies of documents, relied upon by the prosecution, were supplied to the accused. Charge u/s 18 of the Act,

was framed against him, to which he pleaded not guilty, and claimed trial.

4. The prosecution, in support of its case, examined Yogender Nehra, DSP PW1, Rameshwar Kumar, SI PW2, Fateh Singh, Constable PW3,

Rajender Singh, SI PW4, Balbir Singh, retired SI PW5, and Ranbir Singh, retired SI, PW6. Thereafter, the Public Prosecutor for the State, closed

the prosecution evidence.

5. The statement of the accused u/s 313 Cr.P.C. was recorded, and he was put all the incriminating circumstances, appearing against him, in the

prosecution evidence. He pleaded false implication. He, however, did not lead any evidence, in his defence.

6. the Public Prosecutor for the State, the Counsel for the accused, and, on going through the evidence, on record, the trial Court, convicted and

sentenced the accused/appellant, as stated hereinbefore.

7. Feeling aggrieved, against the judgment of conviction, and the order of sentence, rendered by the trial Court, the instant appeal, was filed by the

accused/appellant.

8. I have heard the learned Counsel for the parties, and have gone through the evidence and record of the case, carefully.

9. The Counsel for the appellant, at the very outset, submitted that though affidavit Ex.PD1, of Kailash Chander, MHC, was tendered into

evidence, yet he was not produced for cross-examination, as a result whereof, valuable and indefeasible right of the accused, with regard to cross-

examination, was defeated. The submission of the Counsel for the appellant, in this regard, appears to be correct. Ex.PD1, affidavit of the formal

witness, was tendered into evidence, by the Public Prosecutor for the State, but he was not produced, in the Court, on that date, or even later on,

for his cross-examination, and, as such, the link evidence became incomplete. The affidavit aforesaid, without affording an opportunity to the

accused, to cross-examine the deponent thereof, could not be taken into consideration, as legally admissible evidence. The accused has a valuable

and indefeasible right to cross-examine the witnesses. He must be afforded an opportunity to do so. It is a different matter, whether he avails of

that opportunity or not. The prosecution cannot take up the plea, that when the affidavit of this witness, was tendered into evidence, and he was

not present, the accused could ask that he wanted to cross- examine him, and thus, he could be produced. By not producing this witness, for

cross- examination, by the accused, he was deprived of his valuable and indefeasible right. In Gian Singh v. State of Punjab, 2006(3) Criminal

Court Cases 480 (P&H) . 2006(2) RCR(Criminal) 611, the affidavits of police Constables, were tendered into evidence, but they were not

produced, in the Court for cross-examination. In these circumstances, it was held that the link evidence was missing, which was a material infirmity,

and, ultimately, the conviction was set aside. In Jai Singh v. State of Haryana, 1995(3) RCR 627, the affidavits of the Police Constable and the

HC were tendered into evidence, but both of them, were not kept present, in the Court for cross-examination. In these circumstances, it was held

that the affidavits could not be read into evidence and, as such, the link evidence was incomplete and the case of the prosecution was bound to fail.

The principle of law, laid down, in the aforesaid authorities, is fully applicable to the facts of the present case. Under these circumstances, the

affidavit, Ex.PD1, without offering the deponent thereof, for cross-examination by the accused, could not be read into evidence. As such, the link

evidence, being incomplete, the appellant is liable to be acquitted. The trial Court, in my opinion, was wrong, in holding that the link evidence was

complete. The submission of the Counsel for the appellant, being correct, is accepted.

10. It was next submitted by the Counsel for the appellant, that the sample impression of the seal, was not sent to the Forensic Science

Laboratory, as a result whereof, it could not be ascertained that, as to whether, the seals on the sample, were the same, as were allegedly affixed,

at the time of alleged seizure. Ex.PD, is the affidavit of Fateh Singh, Constable, who took the sample to the office of the Forensic Science

Laboratory. He stated that he was handed over the sample on 29.01,1994, with seals intact, and he deposited the same, in the office of the

Forensic Science Laboratory. There is nothing, in his affidavit, that he was handed over the sample impression of the seals, and he deposited the

same. It means that neither this witness was handed over the sample impression of seal, nor he deposited the same, in the office of the Forensic

Science Laboratory. Under these circumstances, it could not be said whether the sample was received in the office of the Forensic Science

Laboratory, with seals intact, and whether, the said parcel bore the same seals, as were allegedly affixed by the Investigation Officer and the SHO,

on the same. In State of Rajasthan v, Gurmail Singh, 2005(1) Apex Court Judgments 468 (S.C.): 2005(2) C.C.C 2005 (1) Apex Criminal 521

(SC), the sample seal was not sent to the Laboratory, at the time of sending the sample parcel. The Apex Court, held that the case of the

prosecution was doubtful, on account of this reason. In this view of the matter, the case of the prosecution also became doubtful. The trial Court,

did not take into consideration, this aspect of the matter, as a result whereof, miscarriage of justice occasioned.

11. It was next submitted by the Counsel for the appellant, that though the alleged recovery was affected on 18.01.1994, yet the sample was sent

to the office of the Forensic Science Laboratory, on 27.01.1994, and as such, the delay of 9 days was not explained, by the prosecution witness.

He further submitted that, under these circumstances, the possibility of tampering with the case property, and the sample parcel, could not be ruled

out, especially, when the seals were with the police officials, with whom, the case property, and the sample parcel were. The submission of the

Counsel for the appellant, in this regard, appears to be correct. No explanation, whatsoever, has been furnished, by the prosecution witnesses,

with regard to the delay of 9 days, in sending the sample to the office of the Forensic Science Laboratory. It is the duty of the prosecution, to

prove beyond a reasonable doubt, that none tampered with the sample, till the same reached the office of the Forensic Science Laboratory. Since,

the sample was allegedly sent to the office of the Forensic Science Laboratory, after 9 days, it could not be safely held that he same remained

untampered with. This fact casts a shadow of doubt, on the case of the prosecution. In Gian Singh v. State of Punjab, 2006(3) C.C.C 480 (P&H)

: 2006(2) RCR(Criminal) 611, there was a delay of 14 days, in sending the sample to the office of the Chemical Examiner. Under these

circumstances, it was held that the possibility of tampering with the sample, could not be ruled out, and the link evidence was incomplete.

Ultimately, the appellant was acquitted, in that case. In State of Rajasthan v. Gurmail Singh, 2005(1) Apex Court Judgments 468 (S.C.) : 2005(2)

Criminal Court Cases 59 (S.C.) : 2005(2) RCR(Criminal) 58 (Supreme Court), the contraband remained in the Malkhana for 15 days. The

Malkhana register was not produced, to prove that it was so kept in the malkhana, till the sample was handed over to the Constable. In these

circumstances, in the aforesaid case, the appellant was acquitted. In Ramji Singh v. State of Haryana, 2007(3) Criminal Court Cases 955 (P&H) :

2007(3) RCR(Criminal) 452, the sample was sent to the office of the Chemical Examiner after 72 hours, the seal remained with the police official,

and had not been handed over to any independent witness. Under these circumstances, it was held that this circumstance would prove fatal to the

case of the prosecution. No doubt, the prosecution could lead other independent evidence, to prove that none tampered with the sample, till it

reached the office of the Forensic Science Laboratory. The other evidence produced by the prosecution, in this case, to prove the link evidence, is

not only deficient, but also unreliable. In these circumstances, the principle of law, laid down, in the aforesaid authorities, is fully applicable to the

facts of the present case. The delay of 9 days, in sending the sample to the office of the Forensic Science Laboratory, and non-strict proof, by the

prosecution, that the same was not tampered with, till it was deposited in that office, must prove fatal to the case of the prosecution, as the

possibility of tampering with the same, could not be ruled out. The submission of the Counsel for the appellant, in this regard, being correct, is

accepted.

12. It was next submitted by the Counsel for the appellant, that no independent witness, despite availability, was joined, as a result whereof, the

case of the prosecution, became doubtful. Balbir Singh, SI PW5, stated that the weights and scale were brought by Som Nath, HC, from village

Bamla. There is nothing, in his statement, that he was asked to bring the independent witness. He also stated, during the course of his cross-

examination, that many persons were going and coming, in the fields, but none was asked to became witness. It means, that no effort was made to

join an independent witness, despite availability. This shows that no effort, whatsoever, was made to join an independent witness, despite

availability. Since minimum stringent punishment is provide for the shable under the Act, and according to the provisions of Section 51 of the Act

Provision of Code of Criminal Procedure, relating to search, seizure and arrest shall apply to the extent the same are not inconsistent with the

provisions of the Act, it was imperative, on the part of the Investigating Officer, to join an independent witness, at the time of the alleged search,

and seizure or at least to make a genuine, sincere and real effort, to join such a witness. The search and seizure, before an independent witness,

would have imparted much more authenticity and creditworthiness, to the proceedings, so conducted. It would have also verily strengthen the

prosecution case. The said safeguard was also intended to avoid criticism of arbitrary and highhanded action, against the authorized Officer. In

other words, the Legislature, in its wisdom considered it necessary to provide such a statutory safeguard, to lend credibility to the procedure,

relating to search and seizure, keeping in view the severe punishment, prescribed under the Act. That being so, it was imperative for the authorized

Officer, to follow the reasonable, fair and just procedure, as envisaged by the Statute, the failure to do so, must be viewed with suspicion. The

legitimacy of judicial procedure, may come under cloud, if the Court is seen to condone acts of violation of statutory safeguards, committed by the

authorized officer, during search and seizure operation and may also undermine respect of law. That cannot be permitted. In the instant case, the

alleged recovery being minor, now falling within the ambit of non-commercial quantity, and chances of plantation of the same, against the accused,

could not be ruled out, it became the bounden duty of the Investigating Officer, to observe all the safeguards, provided under the Act, at the time

of search and seizure. It is, no doubt, true that, in the absence of corroboration through an independent source, the evidence of the official

witnesses, cannot be disbelieved and distrusted, blind-foldely, if the same is found to be creditworthy. However, when the evidence of the official

witnesses, is found to be not cogent, convincing, reliable and trustworthy, then on account of non-corroboration thereof, through an independent

source, certainly a doubt is cast, on the prosecution story. In the instant case, the evidence of the prosecution witnesses, does not inspire

confidence, in the mind of the Court. In this view of the matter, non-corroboration of the evidence of the official witnesses, through an independent

source, certainly makes the case of the prosecution suspect. In State of Punjab v. Bhupinder Singh, 2001(1) RCR(Crl.) 356, a Division Bench of

this Court, held the case of the prosecution, to be doubtful, on account of non-joining of an independent witness, though the recovery was effected

from a busy locality. In State of Punjab v. Ram Chand, 2001(1) RCR(Crl.) 817, a Division Bench of this Court, held that it was imperative to join

an independent witness, to vouchsafe the fair investigation. On account of non-joining of an independent witness, it was held that the accused was

entitled to be given the benefit of doubt. The principle of law, laid down, in the aforesaid authorities, is fully applicable, to the facts of the instant

case. On account of non-joining of an independent witness, at the time of the alleged search and seizure, the case of the prosecution, became

highly doubtful. The trial Court failed to take into consideration, this aspect of the matter, as a result whereof, miscarriage of justice occasioned.

13. In the instant case, there was violation of the provisions of Section 55 of the Act, as the case property and the sample were not produced

before the Magistrate. Section 55 of the Act, lays down that an Officer Incharge of Police Station shall take charge of and keep in safe custody,

pending the orders of the Magistrate, all articles seized, under this Act, within the local area of that Police Station, and which may be delivered to

him, and shall allow any officer who may accompany such articles, to the Police Station, or who may be deputed for the purpose, to affix his seal

to such articles, or to take samples of, and from them, and all samples, so taken, shall also be sealed with a seal of the Officer-in-charge of the

Police Station. The perusal of the provisions of Section 55 of the Act, clearly reveals that the case property and the sample are required to be

produced before the Magistrate, so as to ensure, that there was no false implication of the accused, and that accused. No doubt, the provisions of

Section 55 of the Act are directory, in nature, yet that does not mean that the same should seprately and intentionally breached. Had any

explanation been furnished, by the Investigating Officer, as to what prevented him, from producing the case property, before the lllaqa Magistrate,

immediately after the search and seizure, the matter would have been considered, in the light thereof, but in the absence of any explanation, having

been furnished, by the Investigating Officer, in this regard, the Court cannot coin any of its own, to fit in with the prosecution case. Since, there was

deliberate and intentional breach of the provisions of Section 55 of the Act, by the Investigating Officer, the same cannot be condoned. In Gurbax

Singh v. State of Haryana, 2001(1) RCR(Crl) 702 (S.C.), it was held that non- compliance of the provisions of Sections 52, 55 and 57, which

are, no doubt, directory and violation thereof, would not ipso-facto violate the trial or conviction. However, the Investigating Officer cannot totally

ignore these provisions, and, as such, failure will have bearing on the appreciation of evidence, regarding search and seizure of the accused. The

principle of law, laid down, in the aforesaid authority, is fully applicable to the facts of the instant case. As stated above, the Investigating Officer,

intentionally and deliberately breached the provision of Section 55. He could not say that since the provisions of Section 55 are directory, in

nature, he was not bound to comply with the same. If such a stand of the Investigating Officer is taken, as correct, then the provisions of the Act,

which are directory, in nature, would be flouted with impunity, but him. Compliance of the said provisions, is an indicator, towards the reasonable,

fair and just procedure, adopted by the Investigating Officer, during the course of search and seizure. Non-compliance of such a provision,

deliberately arid intentionally, must be viewed with suspicion. Legitimacy of the judicial procedure, may come under cloud, if the Court seems to

condone acts of violation of statutory safeguards, committed by an authorized officer, during search and seizure operation. Such an attitude of the

investigating agency, cannot be permitted. Intentional and deliberate breach of the provisions of Section 55, certainly caused prejudice, to the

accused, and cast a doubt on the prosecution story. The trial Court did not take into consideration, this aspect of the matter, as a result whereof,

miscarriage of justice occasioned.

14. There is nothing, on the record, to show that the statements, u/s 161 Cr.P.C. of Yogender Nehra, DSP and Rameshwar Kumar, SI/SHO,

were recorded, by Ranbir Singh, SI, the Investigating Officer. No explanation, whatsoever, was furnished by the Investigating Officer, as to what

prevented him, from recording the statements of Yogender Nehra, DSP and Rameshwar Kumar, SI/SHO, u/s 161 Cr.P.C. In Padam Singh v.

State of Haryana, 1997(4) RCR(Criminal) 172 (Division Bench) (P&H), the statement of the DSP, who allegedly reached the spot, at the time of

search and seizure, u/s 161 Cr.P.C. was not recorded. The Division Bench, in the aforesaid authority, under these circumstances, held that non-

recording of the statement of such an important witness, was a serious irregularity, which considerably prejudiced the accused and may make his

testimony tainted. Ultimately, on this ground, and, on other grounds, the conviction was set aside. The principle of law, laid down, in the aforesaid

authority, is applicable to the facts of the present case. Non-recording of the statements of Yogender Nehara, DSP and Rameshwar Kumar,

SI/SHO, by the Investigating Officer, clearly proved that the case property had not been produced before the SHO. The case of the prosecution,

therefore, became highly doubtful, on account of this reason.

15. In view of the above discussion, it is held that the judgment of conviction and the order of sentence, rendered by the Court below, are not

based on the correct appreciation of evidence, and law, on the pint. The trial Court did not take into consideration, the infirmities and lacunae,

enumerated, in the aforesaid paragraphs. Had these infirmities and lacunae, been taken into consideration, by the trial Court, the result would have

been different. The judgment of conviction, and the order of sentence, warrant interference, and are liable to be set aside.

The reasons recorded, hereinbefore, the appeal is accepted. The judgment of conviction 18.02.1997, and the order of sentence dated

19.02.1997, are set aside. The appellant shall stand acquitted of the charge framed against him. If, he is on bail, he shall stand discharged of his

bail bonds. If, he is in custody, he shall be set at liberty, at once, if not required in any other case.