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Balbir Kaur Vs State of Punjab

Criminal Appeal No. 826-SB of 2000

Court: High Court Of Punjab And Haryana At Chandigarh

Date of Decision: Sept. 19, 2008

Acts Referred:
Criminal Procedure Code, 1973 (CrPC) â€" Section 313#Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) â€" Section 18

Citation: (2009) 4 RCR(Criminal) 504

Hon'ble Judges: Sham Sunder, J

Bench: Single Bench

Advocate: T.S. Sangha, with Mr. H.S. Sangha, for the Appellant; S.S. Bhullar, DAG, Punjab, for the Respondent

Final Decision: Allowed

Judgement

Sham Sunder, J.
This appeal is directed against the judgment of conviction, and the order of sentence dated 21.8.2000, rendered by the

Court of Addl. Sessions Judge, Bathinda, vide which it convicted the accused/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 2 kgs. 100 grams of opium, without any permit or licence.

2. The facts, in brief, are that on 15.5.1995, ASI Chhota Ram, accompanied by other police officials, left the Police Station, by a Govt. Jeep for

patrol duty, in the area of villages Sukhladhi, Tarkhan Wala, Bagha etc. and when the Police party reached near village Bagha Balkar Singh, a

public witness, came across it and he was also joined. When the police party reached Tarkhan Wala- Sukhladhi road crossing in the area of said

village Bagha, accused Balbir Kaur was seen coming from the side of village Tarkhan Wala while carrying a bag. However, on seeing the Police

party, she, at once, tried to give a slip by a hasty retreat. On suspicion she was apprehended. ASI Chhota Ram suspected that some contraband

was being carried by her, in the bag, held by her. Accordingly the search of the bag was conducted, in accordance with the provisions of law, in

the presence of Jatinder Singh Aulakh, S.P.(H) and Satish Kumar Asthana, IPS, as a result whereof 2 kgs. and 100 grams opium, was recovered

therefrom. A sample of 10 grams was taken out. The sample, and the remaining opium in a packet 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 her 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 her, to which she pleaded not guilty, and claimed trial.

4. The prosecution, in support of its case, examined Surjit Singh, SHO Police Station Raman, PW1, who produced the case property as well as

the accused before the Judicial Magistrate Ist Class, Talwandi Sabo on the next day and also sent the sample to the Chemical Examiner, Patiala,

Constable Bikkar Singh, PW2, who tendered his affidavit Ex. PE ASI Chhota Ram, PW3, the Investigating Officer of the case and Jatinder Singh

Aulakh, at that time Superintendent of Police (Headquarter) PW4, a witness to the recovery. Thereafter, the Additional Public Prosecutor for the

State, closed the prosecution evidence.

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

prosecution evidence. She pleaded false implication. It was stated by her, that on 13.5.1996, she accompanied by Parveen Kaur, her husband''s

brother''s daughter was coming from Hanumangarh by bus and when their bus reached at Sangat road crossing some police officials stopped the

bus. She further stated that thereafter the police started checking the same. In the process of checking of the bus, a police official tried to

misbehave with her, which led to dispute, between her, and some police officials It was further stated by her that she along with said Parveen Kaur

was taken to Police Station Sangat. On the next day, her husband also reached there and met the SHO, Police Station Sangat, to get them

released. She further stated that though the police released Parveen Kaur, yet it involved her, in this false case. She further stated that, in this

respect her husband also filed an application through Counsel before the Ilaqa Magistrate. She also examined Sukhwant Singh, ASI, DW1, ASI

Malkeet Singh DW2, Surjit Singh, DW3 and Parveen Kaur, DW4, in her defence. Thereafter she closed her defence evidence.

6. After hearing the Addl. 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, 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

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 Balkar Singh, independent witness, was joined by the Investigating Officer, at

the time of the alleged recovery, yet he was not examined. He further submitted that non-examination of Balkar Singh clearly revealed that the

prosecution withheld the best evidence, in its possession. He further submitted that an adverse inference could be drawn that had he been

examined, he would have not supported the case of the prosecution. He further submitted that the examination of Balkar Singh, independent

witness, in view of the defence, taken up by the accused, that she was falsely implicated, on account of the reason, that the police officials

misbehaved with her during the process of checking of the bus, was essential to reveal the truth. No doubt, the Additional Public Prosecutor for

the State gave up Balkar Singh, independent witness, as won over by the accused. However, there is nothing, on the record, as to on the basis of

which material or data, the Additional Public Prosecutor, came to the conclusion, that this witness had been won over by the accused

and,therefore if examined he would damage the case of the prosecution. It is, no doubt, true that the Additional Public Prosecutor for the State is

the master of the case. It is for him to decide, as to which witness, he wants to examine and which witness he does not want to examine. However,

he is required to exercise such a discretion, in a bona fide manner, and not in an arbitrary and capricious manner. Since, in this case, the

independent witness was given up, as won over by the accused, without any material or data, or without any application of the police, it could be

said that the discretion was exercised by the Additional Public Prosecutor, for the State, in an arbitrary and capricious manner. The evidence of

Balkar Singh, independent witness, was very much essential, to reveal the truth, especially in view of the defence set up by the accused, who is a

lady, regarding misbehaviour with her, by the police officials, resulting into her false implication. The prosecution, thus, withheld the best evidence in

its possession. In State of Punjab v. Nachhattar Singh @ Bania, 2007 (3) RCR (Criminal) 1040, a case decided by a Division Bench of this

Court, an independent witness was joined, but was not examined. In these circumstances, it was held that the case of the prosecution became

doubtful. The principle of law, laid down, in the aforesaid authority, is fully applicable to the facts of the present case. Non-examination of Balkar

Singh, independent witness by the prosecution, without any valid reason, made its case highly doubtful. The submission of the Counsel for the

appellant, in this regard, being correct is accepted.

10. It was next submitted by the Counsel for the appellant, that the link evidence, in this case, was completely missing. He further submitted that

Surjit Singh, PW1, the then SHO, before whom the case property was allegedly produced stated that he did not deposit the same, in the judicial

Malkhana, for want of space. He further stated that on 24.5.1995 he sent the sample parcel to the office of the Chemical Examiner, Patiala,

through Constable Bikker Singh. This statement of Surjit Singh, retired Inspector, PW1 is, however, belied by Ex.D2, copy of the entry, in register

No. 19 of the Police Station. It is evident from this document, that the case property and the sample parcel were deposited with the MHC in the

Malkhana. Surjit Singh, PW1, admitted, during the course of cross-examination that the key of the Malkhana remained with the Head Constable.

Since as per entry D2, the case property was deposited in the Malkhana, and key thereof remained with the Head Constable, it could not be said

that the case property and the sample parcel remained with the SHO, until the same (sample) was sent to the office of the Chemical Examiner.

How the sample parcel was taken out of the Malkhana, by him, is not known. There is no evidence, on the record, as to who handed over the

sample parcel to him for further sending the same to the office of the Chemical Examiner. Had the case property and the sample parcel remained

with him, and had he not deposited the same, in the Malkhana, the matter would have been different. Under these circumstances, the link evidence

was incomplete, in this case. It is incumbent upon the prosecution to prove beyond a reasonable doubt that there was no possibility of tampering

with the sample parcel, at any point of time, until it reached the office of the Chemical Examiner. If the prosecution fails to do so, then the link

evidence becames incomplete. In State of Rajasthan v. Daulat Ram, 1980 SCC (Crl.) 683, the prosecution failed to prove beyond a reasonable

doubt, all the links starting from seizure. It was held that the possibility of sample parcel being changed or tampered with, during the period it

changed several hands till its reaching the Public Analyst, could not be ruled out. The prosecution thus, miserably failed to prove the completion of

link evidence in the instant case.

11. The next limb of argument of the Counsel for the appellant, regarding the non-completion of link evidence was to the effect, that though the

alleged recovery was effected, on 15.5.1995, yet the sample parcel was sent to the Chemical Examiner on 24.5.1995. He further submitted that

delay of 9 days in sending the sample was not explained, and, as such, the possibility of tampering with the same, could not be ruled out. The

submission of the Counsel for he appellant, in this regard, appears to be correct. It is, no doubt, true that mere delay in sending the sample parcel

to the office of the Chemical Examiner, in itself, is not sufficient to come to the conclusion that the sample parcel was tampered with, at any point of

time. In such a situation, the Court is required to fall back, on the other evidence, produced by the prosecution. If after perusal of the other

evidence, the Court comes to the conclusion, that there was no possibility of tampering with the sample parcel, until it reached the office of the

Chemical Examiner, then the same can be believed. In the instant case, as stated above, the prosecution miserably failed to prove the completion

of link evidence. The other evidence produced by the prosecution, therefore, could be said to be not only deficient but also unreliable. In this

background, the Court is to see, as to whether, the possibility of tampering with the sample parcel until it reached the office of the Chemical

Examiner could be ruled out, or not. In Gian Singh v. State of Punjab 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 (2) RCR(Criminal) 58: 2005 (1) Apex Criminal 521 (SC), 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) RCR (Criminal) 452 (P&H), 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 Chemical Examiner. The other

evidence produced by the prosecution, in this case, to prove the link evidence, as held above, 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 Chemical Examiner, 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. The next limb of argument of the Counsel for the appellant, regarding the non-completion of link evidence, was to the effect, that no specimen

impression of the seal, was deposited, in the Malkhana, and, as such, the question of handing over the same to Bikker Singh, Constable, did not

arise. The submission of the Counsel for the appellant, in this regard appears to be correct. Ex.D2, copy of the entry of Malkhana register does not

show that the sample impression of the seal, was deposited therein. Since the documentary evidence belies the deposit of the sample impression of

the seal, where from it was handed over to Constable Bikker Singh, for deposit thereof, in the office of the Chemical Examiner, along with the

sample parcel is not known. It,therefore, can be said that the sample impression of the seal was never deposited with the Chemical Examiner. In

these circumstances, the Chemical Examiner was deprived of ascertaining as to whether the seals affixed on the sample parcel, at the time of

alleged recovery, tallied with the specimen impression of the seals. The other evidence produced by the prosecution to prove its link evidence has

already been held to be deficient and unreliable. In State of Rajasthan''s case (supra), the sample impression of the seal was not sent to the

Laboratory for the comparison of the seals, on the sample. It was held that, therefore, there was no evidence to prove satisfactorily that the seals

found were, in fact the same, as were affixed on the sample parcel immediately after seizure of the contraband. The principle of law laid down in

State of Rajasthan''s case (supra) if fully applicable to the facts of the instant case. On account of this reason, the case of the prosecution also

became doubtful.

13. It was next submitted by the Counsel for the appellant, that the defence version set up by the accused, was more probable, than the

prosecution version, but the trial Court failed to take into consideration the same, as a result whereof it fell into a grave error, in recording

conviction, and awarding sentence to the accused. The submission of the Counsel for the appellant, appears to be correct. A specific stand was

taken up by the accused in her statement u/s 313 Cr.P.C. that, in the bus, in which she along with Parveen Kaur, her husband''s brother''s daughter

was travelling on 13.5.1996, during the process of checking thereof, by the police officials of Police Station Sangat, they misbehaved with her, as a

result whereof, a dispute arose. She further stated that she along with Parveen Kaur was taken to the Police Station and when her husband came

to know of all this, he went to the Police Station, for the purpose of their release. She was not released but Parveen Kaur was released and,

ultimately, on 15.5.1995, this false case was registered against her. This version of the accused was duly supported by Parveen Kaur, DW4, in all

material particulars and Surjit Singh, DW3, at the relevant time a Clerk with Shri K.S. Bhullar, Advocate, District Court, Bathinda. Normally, a

lady, in the Indian society would not come up with such an allegation. However, when she is compelled by the circumstances, then she can muster

courage to bring to the notice of the entire world, that a particular person misbehaved with her. Had the police officials not misbehaved with the

accused, she would have been the last lady to make such an allegation against them. The witness, in whose presence, the police officials

misbehaved with the accused, supported her version, while appearing as DW4. Not only this, even an application was given by Mr. K.S. Bhullar,

Advocate on 15.5.1995 at 11.45 am against the police of Police Station Sangat. Ex.D4 is the copy of that application. In this application it was

stated that when Balbir Kaur and Parveen Kaur were travelling in a bus on 13.5.1996, the police of Police Station Sangat conducted search

thereof. It was further stated that during the course of search it used filthy language against Balbir Kaur and Parveen and on their intervention, the

police felt annoyed with them. Thereafter they took them into custody forcibly. The instant case was registered against the accused at about 3.15

pm on 15.5.1995. Ruqa was sent at 2.30 pm. It means that the alleged recovery was shown against the accused, after moving of application dated

15.5.1995 at 11.45 am by Mr. K.S. Bhullar, Advocate, detailing therein the misbehaviour of the police officials of Police Station Sangat with her

(accused). Mr. K.S. Bhullar could not make such an application, before the registration of the case, had actual incident, as detailed therein, not

taken place. The defence version duly corroborated by the defence evidence, produced by the accused, was more probable, than the prosecution

story. The accused is not required to prove the same beyond a reasonable doubt. She was only required to probalise her defence. As stated

above, defence evidence in this case was more probable than the prosecution version. The trial Court was required to act upon the same. It had

failed to do so wrongly. Once the defence version is held to be more probable than the prosecution version, the accused is entitled to acquittal.

The submission of the Counsel for the appellant, in this regard, appears to be correct and stands accepted.

14. 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 point. 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.

15. For the reasons recorded, hereinbefore, the appeal is accepted. The judgment of conviction and the order of sentence dated 21.8.2000, are

set aside. The appellant shall stand acquitted of the charge framed against her. If, she is on bail, she shall stand discharged of her bail bonds. If, she

is in custody, she shall be set at liberty at once, if not required in any other case.