Dinesh Vs Union of India (UOI)

Court: Madhya Pradesh High Court (Indore Bench)

Date of Decision: Aug. 26, 2010

Acts Referred: Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) â€" Section 21, 55, 57, 8

Citation: (2011) ILR (MP) 210

Hon'ble Judges: I.S. Shrivastava, J

Bench: Single Bench

Final Decision: Allowed

Judgement

I.S. Shrivastava, J.
These appeals have been preferred being aggrieved by the judgment dt. 20/03/2007 passed by the Court of Shri

Abhay Kumar, Special Judge, N.D.P.S. Act, Ratlarh, in Special-Case No. 40/2003, by which the Appellants Chhaganal and Dinesh have been

convicted u/s 8/21(c) of the N.D.P.S. Act and sentenced to R.I. of ten years along with fine of Rs. 1,00,000/- and in default of payment of fine

further directed to undergo R.I. of one year to each of the Appellant."

2. According to prosecution case on 02/07/2003 Shri Satyendra Kumar Tugnawat, Sub Inspector, CBN, Ratlam, received information through

informer that two persons Chhaganlal and Dinesh, travelling in a Maruti Car bearing registration No. RJ-09-5018, will carry Heroine from Ratlam

to Indore. Hence, on this information panchnama of the information of the informer was prepared. Thereafter in the supervision of Shri J.C.

Shrivastava raid party was arranged and reached with the witnesses to spot. At about 12.00 P.M. a new Maruti Car came from the side of Ratlam

and it was intercepted and two persons were found in the Can Chhaganlal was Driver of the Car and other person told his name Dinesh. They

were apprised with the information of the informer and after obtaining their due consent for search the police party took the search of the person.

On search of the Car two bags of Jute were found in the Dicky of the Car which contained Heroine and they were marked as Article A and B.

Article-A contained 6 Kg. 200 Gram and Article B which contained 10 Kg. 200 Gram Heroine. Thereafter two samples 5 Gram of each was

prepared from each bag and marked as article A-1, A-2 and B-1, B-2. In a canvas bag 4 Trousers, 4 Shirts and a Loongi was found which was

also sealed and marked as Article C. Panchnama impresession of seal and spot map was prepared. All the articles and sample were sealed and all

the samples and packets were seized on the spot. Other panchnamas were prepared. The accused persons were arrested. Thereafter police party

returned to the office and seized property was presented along with report u/s 57 of the N.D.P.S. Act before the Superintendent. On his direction

the property was deposited in the departmental Malkhana. The samples were sent to Government Opium & Alkaloid Factory, Neemuch and from

the report it was confirmed as Heroine.

3. On interrogation Chhaganlal in his statement stated that he received Heroine from Ramnarayan for which they paid Rs. 3 lac to him, hence raid

was made at the house of the Ramnarayan and Rs. 2,90,000/- was seized from his house in his absence, Ramnarayan was called for interrogation,

but he did not appear on 24/09/2005. On second summon he appeared on 25/09/2005. He also admitted that Chhaganlal came to his house to

purchase the Heroine. Ramnarayan was also added as an accused in the offence and after investigation supplementary challan was filed against

Ramnarayan and after trial he has been acquitted vide judgment dated 20/09/2007, and the Appellants have been convicted as mentioned above,

hence this appeal.

4. It has been argued on behalf of the Appellants that independent witnesses of the seizure memo Ex.P.5 and other panchnama Ex.P.2 to Ex.R 15

were hostile and not supported the proceedings taken-up by the Investigating Officer. There was difference of weight of samples which was

received in the F.S.L. At the time of packing of the sample colour was brown and in the F.S.L. white powder was found, hence samples were

changed and tampered. Those samples which were seized on the spot were not sent for chemical analysis, there was non compliance of Section 55

of the N.D.P.S. Act. Shri N.P. Ojha, Investigating Officer and members of raiding were not examined. The panchnamas were not prepared as per

procedure. The statement of Chhaganlal and Dinesh recorded u/s 67 did not contain the place and time when it was recorded and it was

concoctated. The information u/s 57 of the N.D.P.S. Act was suspicious as it did not contain the out ward number on it. Original letter has been

filed with the challan, while the original copy was to be sent to the superior officer. Hence, the Appellants were not lible to be convicted on the

basis of the evidence produced, hence, the appeal should be allowed.

5. It has been argued on behalf of the Respondent that the ease was rightly proved on the basis of the evidence produced before the trial Court,

the minor discrepancies are not important and on the basis of it trial is not vitiated. The appeal being devoid of merit be dismissed accordingly.

6. Considered the arguments and the record of the trial Court perused.

7. The panchnama Ex.P.2 to Ex.P. 10 were prepared before the independent witnesses Devendra (P.W.2) and Arvindsingh (P.W.3). The

independent witnesses were hostile and they have not supported the prosecution case. According to Devendra (P.W.2) about two and half years

before he went to C.B.N. Office to repair Cable. Narcotics people got his signature and nothing was seized before him. He did not went to

Dosigaon with the Narcotics party. He does not know the accused persons. Panchnamas Ex.P.2 to Ex.P. 10 bears his signature. He has denied

the proceedings step by step taken-up by the Seizing Officer.

8. Arvind singh (P.W.3) has deposed that two and half years before he went to the office of the Narcotics because in that Office he has given

Cable connection. There on the call of the officers he signed some papers. Nothing was seized before him and he was not brought to Dosigaon

Naka by the people of the Narcotics Department. He has accepted his signatures on Ex.P.2 to Ex.P.10, but has denied the step by step

proceedings taken-up by the Seizing Officer and has not supported the prosecution case. In this way both these independent witnesses have not

supported the prosecution case and panchanma Ex.P.2 to Ex.P. 10. Hence the fact of seizure was not supported by the evidence of independent

witnesses.

9. As regards the preparation of samples and their identity is concerned, according to the statement of Seizing Officer Shri Satyendra Kumar

Tugnawat (P.W.4), he prepared the samples A-1, A-2 and B-1,B-2 from the bulk qunatity of sacks of Heroine and marked as Article A and B.

According to his statement in both the sacks Article A and B grey color powder was sealed. According to statement of B.M. Goyal(P.W.6),

Assistant Chemical Examiner, he found the samples intact. On opening Article A-1 he found brown colour powder and in sample B-1 he found

white colour powder which was tasted by him. He has not given any explanation that how the colour of the powder was changed. In this way the

grey colour powder which was sent to F.S.L. in Article A-1 and B-1 was not found in the F.S.L. hence it was doubtful whether the same powder

was sent for chemical analysis to F.S.L. which was seized on the spot. It has also been argued that there was difference of weight in the samples

Article A-1 and B-1 contained 5 Gram of Heroine, while on weightment in the F.S.L. weight of Article A-1 was 4.46 Gram and Article B-1 was

4.47 Gram. It has been argued by the Appellants that the samples were changed and quantity was also changed.

10. In reply it has been argued by Respondent counsel that first weightment was at the place of incident, while in the F.S.L. its weight is taken by

chemical balance or electronic balance which is accurate, even if at the time of weightment on spot air is blowing then the weight of the sample may

vary.

11. Considered the arguments. It is correct that when wight is taken in a covered place or room by sensitive balance then measurement of weight is

very accurate and if weight is taken by ordinary balance in air then the weight of sample will be different from that weight taken by sensitive

balance. Same situation is in this case the measurement is taken in the F.S.L. by sensitive balance in close place and while on the spot the weight

was taken in the open space and the difference weight is in the fraction of Gram which is negligible, hence the difference of weight is not of much

importance in this case. In this way independent witnesses of the seizure memo were hostile and they have not supported the fact of seizure of

Heroine. The samples were doubtful. At the time of the sealing of sample grey powder was sealed in it while at the time of chemical analysis in

Article A-1 brown powder and in Article B-1 white powder was found, for which no explanation has been given therefore, under the

circumstances it was doubtful that whether the sample Article A-1, B-1 which were received in the F.S.L. were of the same powder which was

seized. Under these circumstances the samples were doubtful on the basis of the evidence produced, hence the seizure memo was not proved.

12. As regards compliance of Section 55 of the N.D.P.S. Act is concerned, it has been argued that Satyendra Kumar Tugnawat (P.W.4) in his

cross examination in para 7 has admitted that Article A,B,C, were not re-sealed in the office. According to Section 55 of the N.D.P.S. Act, it is

required that the samples should be handed over to the officer incharge of the Malkhana and he should re-seal it with his seal and then property

shall be deposited in the Malkhana. In the Malkhana according to Shri J.C. Shrivastava (P.W.5) there was no double lock system,

13. It has been argued on behalf of the Respondent that the re-sealing of the sample is only required whenever the sample is prepared by any

officer after the deposit of the property in the Malkhana then the such sample has to be sealed by the seal of the incharge of the Malkhana if it is

drawn at the police station.

14. In reply it has been argued by the Appellant that u/s 55 of the Act, it is obligatory for the incharge of the Malkahana to take custody of the

property seized by the Seizing Officer and re-seal with the seal of the incharge of the Malkhana and then deposit the property in the Malkhana.

15. Considered the arguments. Shri J.C. Shrivastava (P.W.5) Superintendent, C.B.N., has admitted that there is no double lock system in the

Malkhana. In the case of R.D. Makwana v. State of Maharashtra 1994 CR.L.J. 1987, it has been held that if the specialized authority conducts a

raid such as Narcotics Control Bureau or for that matter the Customs, Central Excise etc. that they would not be precluded from retaining the

contraband in safe custody at their own headquarters. Hence, if the property is kept in the Malkhana of the office of the C.B.N. then in compliance

of Section 55 of the N.D.P.S. Act, it was to be re-sealed with the seal of the in-charge of the Malkhana and he has to procure the property to

ensure that all the material is kept in safe custody and that there is no scope of its being lost or tampered with. This provision is a reasonable and

necessary one in so far as since the consequences of a prosecution under this Act are serious, it is equally incumbent that safeguards be taken to

ensure that there is no scope for any accident or for that matter negligence or even tampering.

16. A bare reading of Section 55 of the Act reveals that the property to be deposited in Malkhana shall be resealed with the seal of the in-charge

of the Malkhana. If the samples have been prepared after the deposit of the property in the Malkhana then they shall also be resealed in the same

way. Hence the arguments of the Respondent is not acceptable.

17. As regards compliance of Section 57 of the N.D.P.S. Act is concerned, it has been argued that the original report u/s 57 of the N.D.P.S. Act,

Ex.P. 15 has been filed with the challan. It bears no in ward or out ward number, and was not sent to Superintendent, CBN, while the Investigating

Officer should have sent it. Hence compliance of Section 57 of N.D.P.S. Act, is not proved.

18. Considered the arguments. Shri Satyendra Kumar Tugnawat (P.W.4) has deposed that he presented the report u/s 57 of the N.D.P.S. Act to

the Superintendent. In cross examination in para 22 he has admitted that on Ex.P. 15 report u/s 57 of N.D.P.S. Act, no out ward number has been

mentioned and signature of Superintendent for receipt has not been obtained. On this report Shri Shrivastava has appointed N.P. Ojha as

Investigating Officer of the case. On perusal of Ex.P. 15 it reveals that on back side of the last page Shri Shrivastava, Superintendent, has ordered

that on 02/07/2003 that N.P. Ojha is appointed as the Investigating Officer and Shri S.K. Tugnawat (P.W.4) should deposit the property. Hence

this report was not proved to be in the possession of Shri J.C. Shrivastava, Superintendent. Therefore, it reveals that on Ex.P. 15 no in ward or

out ward number has been mentioned, there is no receipt of Shri J.C. Shrivastava, Superintendent, and this report has been filed with the challan,

hence it is not proved that report u/s 57 of the Act was sent to Supterintendent, hence there is non compliance of Section 57 of the N.D.P.S. Act.

In the case of Thandiram v. State of Haryana 2000 SCC(Cri) 189 and in the case of Noor Aga v. State of Punjab 2008 Cri.L.R. 655, it has been

held that the provisions of Section 55 and 57 of the N.D.P.S. Act, not complied with the conviction is bad in law and cannot be sustained. In the

case of Ritesh Chakarvarti v. State of M.P., (2007)1 SCC (Cri) 744, it has been held that offence under the N.D.P.S. Act is a grave one and

hence procedural safeguards provided to the accused requires strict compliance.

19. Hence there was non compliance of Section 55 and 57 of the N.D.P.S. Act, therefore the Appellant was not liable to be convicted.

20. It has also been argued by the Respondent that the possession of contraband with the Appellant was proved, therefore, the Appellant was

rightly convicted. In this respect reliance has been placed on the case of State of Punjab Vs. Lakhwinder Singh and Another,

21. Considered the arguments as has been discussed in the above paragraphs that the seizure panchnama has not been proved and hence it was

not proved that the Appellant was in posession of the Heroine, therefore, the question of presumption does not arises.

22. Therefore, on the basis of the above discussion, I conclude that independent witnesses were hostile. Samples A-1, B-1 was not the same and

a different colour was found in the F.S.L. for which no explanation has been given and there is tampering of samples. Compliance of Section 55

and 57 of the N.D.P.S. Act was not proved. Therefore, the Appellants were not liable to be convicted, hence this appeal deserves to be allowed.

23. Therefore, on the basis of above discussion, this appeal is allowed and the Appellants are acquitted from the charge u/s 8/21(c) of the

N.D.P.S. Act, they be released from custody, if not required in any other offence. Hence ordered accordingly.