



IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
JAIPUR BENCH AT JAIPUR

JUDGMENT

Jagdish & Anr. Vs. The State of Rajasthan
(S.B. Criminal Appeal No.1099/2004)

S.B. Criminal Appeal under Section
374(2) Cr.P.C.

Date of Order :-

February 24, 2011

PRESENT

HON'BLE MR. JUSTICE R.S. CHAUHAN

Mr.Anshuman Saxena, amicus curiae, for the appellants.
Mr.Javed Chaudhary, Public Prosecutor.

REPORTABLE

BY THE COURT:

Today the case is listed in the category of 'orders'. But with the consent of both the parties, this case is being decided finally by this Court at this stage itself.

2. The appellants are aggrieved by the judgment dated 27.09.2004, passed by the Special Judge, (NDPS Cases) and Additional District and Sessions Judge, Khetri, District Jhunjhumu, whereby the learned Judge has convicted the appellants for offences under Sections 8/15 of the NDPS Act ('the Act', for short) and sentenced them to ten years of rigorous imprisonment, and has imposed a





fine of Rs.1 lac each, and in default thereof, to further undergo one year of rigorous imprisonment. The learned Judge has also convicted them for offences under Sections 8/18 of the Act and has sentenced them to ten years of rigorous imprisonment, and has imposed a fine of Rs.1 lac each, and in default thereof, to further undergo one year of rigorous imprisonment. He has also convicted them for offences under Sections 8/20 of the Act and sentenced them to ten years of rigorous imprisonment, and has imposed a fine of Rs.1 lac each, and in default thereof, to further undergo one year of rigorous imprisonment. The sentences were directed to run concurrently.

3. In short the facts of the case are that on 21.07.2000, around 12:30 PM, Narpat Singh (PW-10), RPS (Probationer) SHO, Police Station Buhana, Jhunjhunu, received a secret information that the appellants are keeping ganja, opium, and doda powder in their house and are selling them illegally. Upon receiving this information, he immediately informed his superior officers. He further constituted a raiding party. The raiding party reached the appellants' house around 1:50 PM. After giving the notice under Section 50 of the Act and after informing the appellants about the secret information received by them, the consent of the appellants was taken for their house to



be searched. During the search, two bags of ganja, three plastic bags full of doda powder and one plastic box full of opium were discovered. In all thirty-three kilograms ganja, thirty-seven kilograms of doda powder in one bag, forty-eight kilograms of doda powder in another bag, and thirty-three kilograms of doda powder in a third bag, and 800 gm. of opium were recovered. Samples of 100-100 gms. each were taken and the contraband drugs were sealed. The seal used for sealing the drugs was also sealed. Subsequently, a FIR, FIR No.117/2004, for offences under Sections 8/15, 8/18, 8/20 of the Act was registered against the appellants.

4. After a thorough investigation, the police submitted a charge-sheet for above mentioned offences. In order to buttress its case, the prosecution examined twenty witnesses, and submitted thirty-two documents. The defence examined six witnesses, and submitted seven documents. After going through the oral and the documentary evidence, the learned trial court convicted and sentenced the appellants as mentioned above. Hence, this appeal before this Court.

5. Mr. Anshuman Saxena, the learned amicus curiae on behalf of the appellants, has raised the following



contentions before this Court : firstly, the prosecution case is replete with lacunae. Therefore, the prosecution has not been able to prove its case beyond a reasonable doubt.

6. Secondly, Section 42 of the Act has not been complied with by the police. Although Narpat Singh (PW-10) claims that he had sent the information received by him to his superior officers, but Ex-P/12 shows neither the dispatch number of the Police Station, Buhana, nor the receipt number of the S.P., Jhunjhunu. In fact, during the trial, the prosecution has failed to produce the dispatch register of the Police Station, Buhana and the receipt register of S.P., Jhunjhunu, to prove the fact that, indeed, the information under Section 42 of the Act was sent by Narpat Singh (PW-10) to the S.P. Jhunjhunu. Surprisingly, even the *Rojnamacha* has not been produced to establish this fact. Moreover, the person who had allegedly carried the said information to the S.P. Office even he has not been examined as a witness. Thus, the prosecution has failed to produce a material witness. Therefore, an adverse inference should be drawn against the prosecution. Furthermore, both in the FIR (Ex-P/15) and in the Seizure Memo (Ex-P/7), Narpat Singh (PW-10) has not recorded the fact that upon receiving the information from an informer, the said information was sent to the higher





authorities under Section 42 of the Act. Hence, Ex-P/12, the alleged information sent under Section 42 of the Act, becomes suspect.

7. Thirdly, according to Section 42(2) of the Act, the search warrant is required to be sent to the higher authorities within a period of seventy-two hours. However, in the present case, there is no evidence to prove the fact that such an information was ever sent to the higher officers by Narpat Singh (PW-10). Hence, the mandatory provision of Section 42(2) of the Act has not been followed by the police. In fact, again no witness was produced to prove the implementation of Section 42(2) of the Act. Therefore, again a material witness has been withheld by the prosecution. Thus, an adverse inference ought to be drawn against it.

8. Fourthly, in the evidence of the prosecution, there is utter confusion about the place from where the contraband drugs were actually recovered. According to the FIR (Ex-P/15), the secret information, received by Narpat Singh (PW-10), was that the drugs were kept inside the house, yet according to the prosecution, the drugs were recovered from shop No.2. According to the site plan (Ex-P/17), the contraband drugs were recovered from the



shop No.2. Yet according to Yad Ram (PW-1), the drugs were recovered from the house. But according to Lal Chand (PW-2), the drugs were recovered from the shop. Interestingly, both the recovery witnesses, who are independent witnesses, namely Vijendra Singh (PW-8) and Ramesh Kumar (PW-9), have turned hostile during the trial. Therefore, the prosecution has failed to prove the exact place from where the contraband drugs were recovered. Thus, the possession of the drugs has not been established by the prosecution.

9. Fifthly, there is a contradiction in the prosecution evidence as to where the appellants were found when the raiding party reached the place of recovery. According to the FIR (Ex-P/17) and recovery memo (Ex-P/7), both the appellants were sitting outside the house. Yet according to site plan (Ex-P/17), both the appellants were found sitting inside the shop. According to Girdhari Lal (PW-21), the appellants were sitting in front of the shop. Yet, according to Shiv Pal Singh (PW-3), the appellants were sitting outside the house. Hence, the prosecution has not been able to establish beyond a reasonable doubt that the drugs were recovered from the “possession” of the appellants. Even the *Patta* of the house (Ex-P/31) clearly shows that the house was owned by three



different persons, namely Mangi Lal, Rameshwar Dayal and Jagdish Prasad, and not just by the appellants. Moreover, even shop No.2 happens to be in possession of these three persons. Thus, again the prosecution has failed to prove the possession of the appellants.



10. Lastly, the seals used for seizing the drugs are supposed to be given to the independent witnesses. The seals are not meant to be kept either with the investigating officer or with the Malkhana-in-charge. In case the seals are left with the I.O. or the Malkhana-in-charge, the possibility of tampering with the seized sample cannot be ruled out.

11. According to the learned counsel the seals could not have been sealed at the time of recovery. For, Ex-P/8 claims that the seals were sealed at the time of recovery and prior to the recording of the FIR. Ex-P/14 shows the impression of these seals after the FIR was recorded. Moreover, the seals were not handed over to the independent witnesses. Instead, they were given to the Malkhana-in-charge. Further, the seals were not sent to FSL for comparison of the seal impression with the actual seals. Thus, the recovery becomes doubtful.



12. On the other hand, Mr. Javed Chaudhary, the learned Public Prosecutor, has strenuously contended that Ex-P/12 is the information which was sent by Narpat Singh (PW-10) to the S.P., Jhunjhunu. The information to the superior officers was transmitted through wireless. Therefore, there has been a substantial compliance of Section 42 of the Act. In order to buttress this contention, he has relied upon the cases of ***Dalel Singh Vs. State of Haryana [(2010) 1 SCC 149]*** and ***Karnal Singh Vs. State of Haryana [2009 Cri.L.J. 4299]***. Thus, the requirement of Section 42 of the Act has been fulfilled.

13. Secondly, the shops are located within the premises of the house. Therefore, the prosecution is justified in claiming that the contraband drugs were recovered from the shops, which would, ipso facto, mean that the drugs have been recovered from the premises of "the house". Hence, there is no contradiction within the prosecution case as to the place of recovery of drugs.

14. Thirdly, according to Girdhari Lal (PW-21) and Sajjan Kumar (PW-22), seals were kept intact and the samples were sent to the FSL in a sealed condition. According to the FSL report (Ex-P/32), the samples contained the same seals as the seal impression which was





sent to them by the police. Hence, the contention of the learned counsel for the appellants that the samples may have been tampered with is without any basis.



15. In rejoinder, Mr. Saxena has contended that the FSL should have shown the seal marks in its report in order to establish the fact that the seal which was actually seized and sealed at the time of seizure, the same seal impressions were found and discovered by the FSL. However, the FSL has not done so. Its mere statement in the report that “the seals tallied” is not sufficient to prove the case beyond a reasonable doubt.

16. Heard the learned counsel for the parties and perused the impugned judgment as well as the record submitted before this Court.

17. It is, indeed, trite to state that the burden of proof lies heavily on the shoulder of the prosecution. The prosecution has to cover a great distance between “may be true” and “must be true”. After all, it has to establish its case beyond a reasonable doubt. Moreover, the burden to prove the gravity of offence lies heavily on the shoulder of the prosecution. While discharging its burden of proof, the prosecution has to establish each single fact through cogent and convincing evidence. If evidence is missing, a



fact cannot be said to be proved. Since the NDPS Act imposes one of the harshest sentences and one of the heaviest penalties known to law, the prosecution has to tread carefully and has to establish its case firmly to pinpoint the guilty of the accused-person. It cannot argue on the basis of “may be yes, but perhaps not”. However, for the reasons stated below, the prosecution has failed to prove its case beyond a reasonable doubt.

18. The requirement of Section 42 of the Act is not merely a technical one. In fact, Section 42 of the Act requires a substantial compliance of its mandatory provisions. Since NDPS Act is almost a draconian law, a large number of safety precautions have been prescribed by the Act itself. The first and foremost precaution is that the moment the police receives an information from an informant, it is legally bound to inform the higher authorities. This requirement is laid down in order to check the excess of the police, and to ensure that the police does not falsely implicate a citizen. This requirement also places a burden on the higher authorities to supervise the functioning of the subordinate officers. Hence, this requirement is both in the interest of the accused, and in the interest of the efficiency of the Police Department.



19. A bare perusal of the information, received by Narpat Singh, (Ex-P/11) clearly reveals that the said information does not bear either the dispatch number, or the receipt number. In fact, the prosecution was duty bound, in such a situation, to produce the dispatch register of the Police Station Buhana to firmly establish the fact that the information was sent to the SP, Jhunjhunu, and the information was properly received by them. Moreover, the prosecution should have produced the person who had carried the information from the Police Station to the SP Office. However, the prosecution has failed to produce the police personnel who might have carried this information. Therefore, a material witness has been withheld by the prosecution. Hence, the trial Court should have drawn an adverse inference against the prosecution. But, the learned trial Court has failed to do so.

20. The sending of the information required under Section 42 of the Act becomes more suspected as the FIR (Ex-P/15) does not mention the sending of such an information to the SP, Jhunjhunu. According to the FIR, only a wireless message was sent, but there is no indication that the said information was sent in a written form. In fact, even in the seizure memo (Ex-P/7), there is not a whisper of evidence to show that the information,





under Section 42 of the Act, was sent in a written form to the higher authorities. According to the seizure memo (Ex-P/7), only a wireless message was sent. However, the requirement of law is that in case the information were received at the Police Station, then the same be sent, in writing, and the said piece of information has to be produced by the prosecution during the course of trial. In the present case the information was received at the Police Station. Thus, the prosecution was duty bound to establish that the information was duly sent to the superior officer in writing. Therefore, the mandatory provision of Section 42 of the Act has not been complied with in this case.

21. It is true that both in the case of ***Dalel Singh (Supra)*** and in case of ***Karnal Singh (Supra)***, the Apex Court had observed that in case there is substantial compliance of Section 42 of the Act, then the trial is not vitiated. However, in both these cases, the Apex Court had pointed out that the information to the superior officers can be transmitted through wireless only if the raiding party was on petrol. In case the information is received at the Police Station, then it is imperative to write down the information and to transmit the same to the superior officers. In the case of ***Beckodan Abdul Rahiman Vs. State of Kerala [2002 Cri.L.J. 2529]***, the Hon'ble



Supreme Court had observed that safeguards provided in provisions of Section 42 and in Section 50 of the Act are mandatory in nature. Therefore, their compliance is essential.

22. In the present case, the information was received at the Police Station. But there is no evidence to show that the information was actually transmitted to the superior officers. Hence, the mandatory provision of Section 42 of the Act has not been followed. Thus, the entire trial is vitiated.

23. According to Section 42(2) of the Act, any information taken down in writing under Sub-section (1), or the grounds recorded by the person for his belief under the proviso thereto, it has to be sent to the immediate superior officer within a period of seventy-two hours. In the present case, since Narpat Singh (PW-10) decided to proceed to search the house of the appellants, he was required to record his reasons for his belief under the proviso; he was also required to transmit those reasons to his immediate superior officer within a period of seventy-two hours. Yet, there is not an iota of evidence on record to prove that the mandatory provision of Section 42(2) of the Act has been followed and the superior officer was duly



informed for the reasons of belief of Narpat Singh (PW-10). Thus, the requirement of Section 42(2) of the Act has not been fulfilled.



24. In the case of ***State of West Bengal & Ors. Vs. Babu Chakraborty [2004 AIR 4324]***, the Apex Court had clearly observed that *“great significance has been attached to the mandatory nature of the provisions, keeping in mind the stringent punishment prescribed in the Act. This Court has attached great importance to the recording of the information and the ground of belief since that would be the earliest version that will be available to a Court of law and the accused while defending his prosecution. This Court also held that failure to comply with Section 42(1), proviso to Section 42(1) and Section 42(2) would render the entire prosecution case suspect and cause prejudice to the accused”*. Similar view has also been expressed by the Hon'ble Supreme Court in the case of ***State of Orissa Vs. Laxman Jena [(2009) 16 SCC 332]***.

25. Considering the facts of the case, considering the principles annunciated above, this Court is of the opinion that since the requirements of Section 42 of the Act have not been followed, the appellants deserve to be acquitted on this ground alone.



26. It is equally the duty of the Investigating Agency to not only seal the seals used for the purpose of recovery, but also to hand over the same to the independent witnesses. This requirement has been created to ensure that the seals are not kept by the Investigating Agency, as a grave possibility does exist that in order to succeed in the case, the Investigating Agency might misuse the seals and tamper with the samples. However, in the present case, there is no evidence to show that the seals, once sealed by the Investigating Agency, were handed over to the independent witnesses. On the contrary, there is evidence that the seals were kept with the Malkhana-in-charge, the person under whom the samples were kept. Thus, the possibility that the samples may have been tampered with cannot be ruled out.

27. This possibility is further aggravated by the following facts :- firstly, according to Ex-P/8, the seals were allegedly sealed at the spot where the recovery was made and it was clearly stated in Ex-P/8 that the seals have the letters "MK" written backwards. Yet, Ex-P/14, which was an exhibit drawn subsequent to the chalking out of the FIR – as it contained the FIR Number – clearly shows the impression of seals which were allegedly and already sealed on the spot. Ex-P/14, therefore, creates a grave





doubt whether the seals were really sealed at the spot or whether the recovery was made or not? Secondly, FSL report (Ex-P/32) does not contain the impression of the seal. It is a requirement of law that the FSL, in its report, should have the impression of the seal. It is not sufficient for the FSL merely to record that “the seals of the samples tallied with the impressions of the seals sent by the Investigating Agency”. Such a statement cannot be taken as a gospel truth until and unless the impression of seals is shown in the FSL report (Ex-P/32). Therefore, a grave doubt does exist in the mind of this Court, whether the contraband goods, which were sealed, were kept in a safe custody or not ? Whether the samples were tampered with or not ? These two doubts further cast a cloud over the veracity and authenticity of the FSL report (Ex-P/32). These are grave lacunae which have been left by the prosecution. With these chinks in the armour of the prosecution, the prosecution case is bound to falter.

28. Merely because the two shops happen to be located within the premises of the house, it does not absolve the prosecution from establishing the exact place from which the contraband drugs were recovered. The prosecution case is full of contradictions as to the exact place from where the contraband drugs were recovered.



According to the site plan (Ex-P/17), the drugs were recovered from shop No.2. Yet, according to the Yad Ram (PW-1), the drugs were recovered from the house. According to Saddiq Khan (PW-6), the drugs were discovered in the shop. Thus, it is unclear as to the place from where the contrabands were actually discovered.

29. It is equally the duty of the prosecution to establish that the drugs were recovered from the possession of the accused-persons. According to Ex-P/31, the *Patta* of the house, the house was owned by three different persons namely, Mangi Lal, Rameshwar Dayal and Jagdish. Even the shop No.2 were equally in the possession of these persons. There are contradictions in the case of the prosecution as to where the appellants were found sitting when the raiding party reached the appellants' house. According to Shiv Pal Singh (PW-3), they were found sitting in front of the house. Yet, according to Yad Ram (PW-1), they were found sitting in front of the *Nohra* of the house. Yet according to Lal Chand (PW-2), they were found sitting in front of the shop. According to the site plant (Ex-P/17), they were found sitting in the shop. Since the location of the appellants has been changed by different witnesses, their co-relation with the drugs which were allegedly recovered in the shop / in



the house has not been established by the prosecution. Thus, the prosecution has also failed to prove the “possession” of the drugs by the appellants.



30. The reasoning given by the learned trial court that merely because the shops were located within the premises of the house, therefore, the prosecution has proved its case beyond a reasonable doubt, the said reasoning is highly unacceptable. For, it is a settled principle of criminal jurisprudence that the prosecution has to cover the distance between “may be true” and “must be true”. The conviction cannot be based on surmises and the conjunctures or on grave suspicion. The conviction is to be founded on the solid foundation of the cogent and reliable evidence.

31. For the reasons stated above, this appeal is allowed and the judgment dated 27.09.2004 is, hereby, quashed and set aside. The appellants, namely (1) Jagdish S/o Moolchand and (2) Brahmprakash S/o Jagdish, who are behind the bars, shall be set at liberty forthwith, if not wanted in any other criminal case.

(R.S.CHAUHAN)J.

Manoj Solanki-