Rajesh Dhiman vs The State Of Himachal Pradesh on 26 October, 2020

Equivalent citations: AIR 2020 SUPREME COURT 5353, AIRONLINE 2020 SC 793

Author: Surya Kant

Bench: Hrishikesh Roy, Surya Kant, N.V. Ramana

REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 1032 of 2013

Rajesh Dhiman ..... Appellant(s)
VERSUS
State of Himachal Pradesh .....Respondent(s)

WITH
CRIMINAL APPEAL NO. 1126 OF 2019

Gulshan Rana ..... Appellant(s)
VERSUS
State of Himachal Pradesh .....Respondent(s)

JUDGMENT

Surya Kant, J.

Heard over video conferencing.

2. These Criminal Appeals have been preferred against a common judgment of the High Court of Himachal Pradesh dated 28.08.2012, by which the appellants' acquittal under Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 Page | 1 ("NDPS Act") was reversed and a sentence of ten years rigorous imprisonment and fine of Rs 1,00,000 each was awarded. FACTS

3. The facts giving rise to both the appeals are common. On 09.01.2002, at about 1.00 P.M., a police team led by ASI Purushottam Dutt (PW8) and also comprising Constable Sunder Singh (PW1),

Constable Bhup Singh (PW2) and Constable Bhopal Singh (PW7) were checking traffic at Shamshar when a motorcycle without a number plate was spotted. Gulshan Rana (appellant in Criminal Appeal No. 1126 of 2019) was driving the vehicle and Rajesh Dhiman (appellant in Criminal Appeal No. 1032 of 2013) was seated on the pillion with a backpack slung over his shoulders. They were signalled to stop and documents of the motorcycle were demanded. Meanwhile, another vehicle was halted and its occupants Karam Chand (PW3) and Shiv Ram were included in the search. An attempt was made to associate local residents to witness the subsequent proceedings, but none agreed. Subsequently, the appellants were given option to be searched in the presence of a Magistrate or Gazetted Officer but they consented to be searched by the police on the spot itself. The police then discovered polythene bags containing charas from the Page | 2 backpack carried by Rajesh Dhiman. The polythene bags were weighed and found to be 3kg 100gms. After separating some samples, the charas was duly sealed and handed over to Karam Chand (PW3) who later deposited it at the police station. After completion of personal search of the appellants, they were formally arrested.

4. The prosecution examined nine witnesses to support their case of chance recovery, which included eight police officials and one independent witness, Karam Chand (PW3). Whereas the police witnesses strongly corroborated each other's testimony, PW3 was declared hostile for he claimed not to have witnessed the seizure of the narcotics. The spot map, arrest memo, search memos, consent memo, seizure memo, rukka seals, chemical analysis report and samples of charas were also adduced as evidence. In response, both appellants asserted their innocence. Although the appellants did not lead any defence evidence but they propounded an alternative version and claimed that while returning from a nearby temple, they had given a lift to an unidentified third person. The backpack containing the recovered narcotics was claimed to be owned by the said stranger, who allegedly escaped from the spot when the motorcycle was stopped Page | 3 by the police.

5. The learned Special Judge through judgment dated 28.12.2002 acquitted the appellants holding that charges under the NDPS Act had not been proved beyond reasonable doubt. The trial Court viewed that the witnesses on the spot had either not been examined or turned hostile. Thus, each individual element of the prosecution case, namely, from preparation of personal search memo to consent memo to recovery memo to notifying appellants' relatives about their arrest or handing over of seal to PW3 had come under cloud for want of independent corroboration. Failure to include any other locally□resident as a neutral witness in terms of Section 100(4) of the Code of Criminal Procedure, 1973 ("CrPC"), was also held to cast serious aspersions on the prosecution version. Relying upon a decision of the Rajasthan High Court in Gyan Chand v. State of Rajasthan1, learned Special Judge was also critical of the fact that the complainant himself was the investigating officer which caused serious prejudice to the fairness of the investigation. The trial Court thus concluded that since two versions had emerged, the one which was favourable to the accused ought to be 1993 Cri LJ 3716.

Page | 4 preferred. Consequently, it held that no charas was recovered from the appellants as deposed by the independent witness.

6. However, the High Court in appeal, set-aside the acquittal and convicted the appellants for possession of charas under

> Section 20 of the NDPS Act. The High Court observed that although association of independent witnesses in NDPS cases is always desirable but their non-examination would not per se be fatal to the prosecution case, especially when due efforts are made by the police to secure their presence. Adverting to the facts of the case in hand, the High Court found no reason to draw an adverse inference against non-examination of independent witnesses as PW8 had deposed that an unsuccessful attempt was made to join persons from the locality, and Shiv Ram had been won over. The High Court re-appreciated the entire evidence on record and firmly held that the chain of events commencing from seizure of contraband to its chemical analysis, was complete in all respects. In the absence of any allegation of bias, it was held to be wrong to discard the otherwise impeccable statements of the official witnesses. The High Court dissected a catena of judgments and opined that the police officers' testimonies ought to be subjected to a vigorous standard of scrutiny and Page | 5 corroboration; which, after careful and cautious appraisal, had been met in the instant case. The quantity of charas recovered was held to be 'commercial' and consequently a sentence of 10 years rigorous imprisonment and fine of Rs.1,00,000 (rupees one lakh) was imposed on each of the appellants.

CONTENTIONS OF PARTIES

7. We have heard counsels for the parties at a considerable length and gone through the record. Learned counsel for the appellants vehemently contended that the High Court ought not to have reversed the well-merited acquittal as two distinct versions of the same incident had emerged from the evidence on record, and thus the one beneficial to the appellants ought to be adopted, given the presumption of innocence under our legal system. It was highlighted that the complainant and investigating officer were one and the same, thus, casting doubts on the fairness and neutrality of the investigation. Non-examination of Shiv Ram and non-corroboration by Karam Chand (PW3) was projected as being fatal to the prosecution case. A subtle distinction was sought to be made between cases where independent witnesses were not present and where during cross-examination they actively controverted the prosecution version. It Page | 6 was also argued that the High Court ought not to have convicted the appellants only on the premise that the effect of non-examination of independent witness was inconsequential, for the trial Court's acquittal was predicated on many other legs which have not been engaged with by the High Court at all, including the alternate version given by PW3, read with the statements of the appellants under Section 313 CrPC, as well as the non-compliance of Section 50 of the NDPS Act.

8. Learned State counsel, on the other side, drew our attention to a recent judgment of the Constitution Bench of this Court in Mukesh Singh v. State (Narcotic Branch of Delhi) 2, which has authoritatively settled the law on permissibility of the complainant also being the investigating officer in cases under the NDPS Act. Controverting the appellants' contention regarding non-examination of independent witnesses, an attempt was made to portray the evidence of the official

witnesses as being unimpeachable and inspiring confidence; and therefore, rescission by one independent witness being wholly insufficient for the appellants to earn acquittal.

2020 SCC OnLine SC 700.

Page | 7 ANALYSIS I. Whether bias was caused by complainant also being the investigating officer?

9. The primary issue debated by both sides concerns the effect of the complainant in the present case, PW8, also being the investigating officer. The appellants sought to contend that a long line of cases, ending with Mohan Lal v. State of Punjab3, has laid down the legal proposition that investigation by the complainant himself would be contrary to the scheme of the NDPS Act, thus jeopardizing the entire trial.

10. Suffice to say that the law on this point is no longer res integra and the controversy, if any, has been set at rest by the Constitutional Bench of this Court in Mukesh Singh (supra). The earlier position of law which allowed the solitary ground of the complainant also being the investigating officer, to become a spring board for an accused to be catapulted to acquittal, has been reversed. Instead, it is now necessary to demonstrate that there has either been actual bias or there is real likelihood of bias, with no sweeping presumption being permissible. It would be worthwhile to extract the following conclusions drawn in the (2018) 17 SCC 627.

Page | 8 afore□cited judgment:

> "102. From the above discussion and for the reasons stated above, we conclude and answer the reference as under:
>
> I. That the observations of this Court in the cases of Bhagwan Singh v. State of Rajasthan, (1976) 1 SCC 15; Megha Singh v. State of Haryana, (1996) 11 SCC 709; and State by Inspector of Police, NIB, Tamil Nadu v. Rajangam, (2010) 15 SCC 369 and the acquittal of the accused by this Court on the ground that as the informant and the investigator was the same, it has vitiated the trial and the accused is entitled to acquittal are to be treated to be confined to their own facts. It cannot be said that in the aforesaid decisions, this Court laid down any general proposition of law that in each and every case where the informant is the investigator there is a bias caused to the accused and the entire prosecution case is to be disbelieved and the accused is entitled to acquittal;

II. In a case where the informant himself is the investigator, by that itself cannot be said that the investigation is vitiated on the ground of bias or the like factor. The question of bias or prejudice would depend upon the facts and circumstances of each case. Therefore, merely because the informant is the investigator, by that itself the investigation would not suffer the vice of unfairness or bias and therefore on the sole ground that informant is the investigator, the accused is not entitled to acquittal. The matter has to be decided on a case to case basis. A contrary decision of this Page | 9 Court in the case of Mohan Lal v. State of Punjab, (2018) 17 SCC 627 and any other decision

taking a contrary view that the informant cannot be the investigator and in such a case the accused is entitled to acquittal are not good law and they are specifically overruled." [emphasis supplied]

11. We, therefore, see no reason to draw any adverse inference against PW8 himself investigating his complaint. The appellants' claim of bias stems from the purported delays, non□compliance of statutory mandates and non□examination of independent witness. In effect, the appellants are seeking to circuitously use the very same arguments which have individually been held by the High Court to be factually incorrect or legally irrelevant. Although in some cases, certain actions (or lack thereof) by the Investigating Officer might indicate bias; but mere deficiencies in investigation or chinks in the prosecution case can't be the sole basis for concluding bias. The appellants have at no stage claimed that there existed any enmity or other motive for the police to falsely implicate them and let the real culprits walk free. Further, such a huge quantity of charas could not have been planted against the appellants by the police on its own.

12. The appellants have creatively sought to argue that failure Page | 10 of the police to investigate the alternate theory proffered at the stage of Section 313 CrPC, has caused serious prejudice to them and that reason alone is sufficient not to hold them guilty 'beyond reasonable doubt'. They have explicitly relied upon Paras 18 and 19 of Mukesh Singh (supra), which we deem appropriate to extract as follows:□"18. If the defence of the accused is not properly investigated to rule out all other possibilities, it cannot ever be said that the prosecution has established the guilt "beyond reasonable doubt". A tainted investigation by a complaint who is a "witness" himself to a substantial ingredient of an offence, would in fact give rise to a "doubt" and it is impossible that the case can be established on the parameter of "beyond reasonable doubt";

19. A person accused of criminal offence punishable with a peril to his life or liberty, enjoys certain rights under the Constitution or through long standing development of criminal jurisprudence. Any action which impinges or affects those rights would be said to cause "prejudice to an accused". That in the case of Rafiq Ahmad v. State of U.P., (2011) 8 SCC 300, it is observed and held that prejudice to an accused or failure of justice has to be examined with reference to (i) right to fair trial (ii) presumption of innocence until pronouncement of guilt and (iii) the standards of proof. It is observed in the said decision that whenever a plea of prejudice is raised by the accused, it must be examined with reference to the above Page | 11 rights and safeguards, as it is the violation of these rights alone that may result in the weakening of the case of the prosecution and benefit to the accused in accordance with law;"

13. At the outset, we may clarify that the observations relied upon by the appellants, are not findings, conclusion or resolution by this Court in Mukesh Singh (supra). Instead, a perusal of the judgment shows that it was a contention put forth by one of the parties □which the Bench eventually disagreed with. Further, not only the alternative version projected by the appellants is vague and improbable, but it escapes our comprehension how non□investigation of a defence theory disclosed only at an advanced stage of trial, could indicate bias on part of the police. II. Whether alternate version has been established and what is the effect of lack of independent witnesses?

14. The contention of the appellants that they are entitled to be acquitted on the ground of there being two varying versions of the same incident does not carry any weight. We may firstly clarify that the expression "reasonable doubt" is a well-defined connotation. It refers to the degree of certainty required of a court before it can make a legally valid determination of the guilt of an Page | 12 accused. These words are inbuilt measures to ensure that innocence is to be presumed unless the court finds no reasonable doubt of the guilt of the person charged. Reasonable doubt does not mean that proof be so clear that no possibility of error exists. In other words, the evidence must only be so conclusive that all reasonable doubts are removed from the mind of an ordinary person.

15. This Court in K. Gopal Reddy v. State of Andhra Pradesh,4 explained that "if two reasonably probable and evenly balanced views of the evidence are possible, one must necessarily concede the existence of a reasonable doubt. But, fanciful and remote possibilities must be left out of account. To entitle an accused person to the benefit of a doubt arising from the possibility of a duality of views, the possible view in favour of the accused must be as nearly reasonably probable as that against him." The appellants in the present appeal have miserably failed to make out a case where two reasonable conclusions can be reached on the basis of evidence on record.

16. Secondly, it is useful to point out that in their respective statements under Section 313, CrPC the appellants have claimed (1979) 1 SCC 355.

Page | 13 that when they were coming after visiting a temple, "a person obtained lift from us on vehicle". When they reached Ani Bazar, the police officials demanded the documents of the vehicle and for that purpose they were taken to police station "along with the vehicle and in the meanwhile third person fled away from the place of the incident." This claim that the seized contraband was being carried by an unknown stranger, who had mysteriously appeared on the side of the road seeking a lift and had equally incognizably vanished into thin air as soon as the motorcycle was stopped by the police is ex-facie fanciful, and is without even a shred of evidence. A critical appreciation of such version merely bolsters the prosecution case. The appellants effectively have ended up admitting that they were present on the spot; some interaction with the police had indeed taken place; that there was sufficient cause to stop the vehicle, and that such search was based not on any prior information but was spontaneous and thus, it was a case of chance recovery.

17. Reliance can also not be placed on Karam Chand's (PW3) testimony by the appellants. First, his statement that he was told by the police that there was a third person on the spot is hearsay and inadmissible in view of Section 60 of the Indian Evidence Page | 14 Act, 1872. Second, his credibility had effectively been impeached by the prosecutor during trial. PW3 denies in his examination-in-chief being on the spot or a party to any proceeding; but later he makes a poor attempt to contradict the prosecution story. He also admits to having travelled to the trial Court on the morning of his deposition along with Shiv Ram, who had been won over by the appellants. Third, given that PW3 himself claims to not being present at the time of incident, his statement can at best be construed to mean that no charas was recovered in front of him, and not that no charas was recovered from the appellants at all.

18. As correctly appreciated by the High Court in detail, non-examination of independent witnesses would not ipso facto entitle one to seek acquittal. Though a heighted standard of care is imposed on the court in such instances but there is nothing to suggest that the High Court was not cognizant of this duty. Rather, the consequence of upholding the trial Court's reasoning would amount to compulsory examination of each and every witness attached to the formation of a document. Not only is the imposition of such a standard of proof unsupported by statute but it is also unreasonably onerous in our opinion. The High Court has rightly relied upon the testimonies of the government Page | 15 officials having found them to be impeccable after detailed re-appreciation of the entire evidence. We see no reason to disagree with such finding(s).

III. Whether High Court erred in reversing acquittal in appeal?

19. There is no gainsaid that High Courts are well within their power to reverse an acquittal and award an appropriate sentence; though they cautiously exercise such powers in practice. Illustratively, a few permissible reasons which would necessitate such interference by the High Court include patent errors of law, grave miscarriage of justice, or perverse findings of fact.

20. Here, the trial Court appreciated facts in a mechanical manner and dismissed the prosecution case based on a mis-interpretation of law, particularly qua satisfying the burden of proof. Hence, there were more than enough reasons for the High Court to interfere with the acquittal and arrive at a different finding.

21. The appellants' claim that the High Court erred in not considering non-compliance with Section 50 of the NDPS Act at the stage of appeal, is also premised upon a mistaken Page | 16 understanding of the law. As held in State of Himachal Pradesh v. Pawan Kumar5, the safeguards for search of a person would not extend to his bag or other article being carried by them. Given how the narcotics have been discovered from a backpack, as per both the prosecution and defence versions, there arises no need to examine compliance with Section 50 of NDPS Act.

CONCLUSION

22. For the afore-stated reasons, we do not find any merit in these appeals which are accordingly dismissed. The appellants' bail bonds, if any, are cancelled and the respondent-State is directed to take them into custody to serve the remainder of their ten-year sentences. All other pending applications are disposed of accordingly.

..... J.

(N.V. RAMANA) ..... J.

(SURYA KANT) .....J. (HRISHIKESH ROY) NEW DELHI DATED : 26.10.2020
(2005) 4 SCC 350.

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