Kashmiri Lal vs State Of Haryana on 15 May, 2013

Author: Dipak Misra

Bench: Dipak Misra, B. S. Chauhan

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 1576 OF 2009

Kashmiri Lal ...Appellant

Versus

State of Haryana ...Respondent

J U D G M E N T

Dipak Misra, J.

This Appeal by Special Leave is directed against the judgment of conviction and order of sentence dated July 31, 2008 passed by the High Court of Punjab and Haryana at Chandigarh in Criminal Appeal No. 543-SB of 1996 whereby the learned Single Judge has given the stamp of approval to the conviction and sentence recoded by the learned Additional Sessions Judge, Kurukshetra in S.T. No. 15 of 1993 on 24.7.1996 whereby he, after finding the accused-appellant guilty of the offence punishable under Section 18 of the Narcotic Drugs & Psychotropic Substances Act, 1985 (for brevity 'the Act'), had sentenced him to undergo rigorous imprisonment for a period of ten years and to pay a fine of Rs.1,00,000/- and, in default of payment of fine, to suffer further rigorous imprisonment for a period of one year.

2. The factual matrix as has been undraped by the prosecution is that on 23.12.1992 about 10.00 A.M., Kaptan Singh, the Sub-Inspector, along with other police officials, was present near Deer Park, Pipli, in connection with excise checking in a Tata Mobile Vehicle. Receiving a secret and reliable information to the effect that the accused- appellant would come to the 'dhaba' situated on the G.T. Road, on his scooter, carrying opium and if a picket was held, he could be apprehended, he sent a V.T. message to the Additional Superintendent of Police to reach the place. Thereafter,

Kaptan Singh, along with other police officials, went to the T-point of Jahajo Wali Road on G.T. Road and held a picket. In the meanwhile, the accused was seen coming on his scooter, bearing No. DLS-1756 and at that time Mohmad Akil, Additional S.P., Kurukshetra, along with his staff arrived at the spot. He was apprised of the situation and, thereafter, on his instructions search of the tool box of the scooter was conducted and a polythene bag containing of 5½ Kg. of opium was recovered. Ten grams opium was separated as sample and the remaining opium was put into a separate container. The sample and the container, containing the remaining opium, were converted into parcels duly sealed with seals and taken into possession vide a separate recovery memo. The accused was arrested and a ruqa was sent to the police station on the basis whereof a formal FIR was registered. After completing the investigation the charge-sheet was submitted before the competent court.

3. Before the trial court the accused abjured his guilt, pleaded false implication and claimed to be tried.

4. The prosecution to substantiate its case examined Banarsi Das, Head Constable, PW-1, Dharam Singh, ASI, PW-2, Mam Chand, Constable, PW-3, Ram Udit, Head Constable, PW-4, Akil Mohamad, S.P., PW-5 and Kaptan Singh and the Investigating Officer, PW-6. The accused in his statement under Section 313 of the Code of Criminal Procedure stated that he was employed in the 'dhaba', namely, Man Driver Dhaba at village Teora and he had been apprehended from the 'dhaba' and falsely implicated. In support of his defence, he examined Karan Singh, DW-1, who had recorded the statements of PW-1 and PW-3.

5. Before the learned trial Judge, it was contended that the prosecution had miserably failed to bring home the charge by resting its case solely on the version of official witnesses and not examining any independent witness despite the fact that the accused was apprehended and alleged contraband articles were seized while he was in a 'dhaba'; that there had been non-compliance of Section 50 of the Act inasmuch as he was not properly informed about his right to be searched in presence of a gazetted officer or a Magistrate; that the recovery from the tool box of the scooter would not amount to conscious possession of the contraband article by the accused; and that the non-production of the scooter in court falsified the version of the prosecution. The learned trial Judge dealt with all the aspects and came to hold that the search and seizure was valid; that the accused had not been falsely implicated; and that the non-production of the scooter did not in any manner affect the case of the prosecution. Being of this view, he found the accused guilty and sentenced him as has been stated hereinbefore.

6. Against the conviction and sentence the accused preferred an appeal before the High Court. Apart from raising the contentions which were raised before the learned trial Judge, a further submission was put forth that as per the report of the Forensic Science Laboratory morphine content contained in the sample was found only to be 1.66% and as the morphine percentage in the bulk of the opium was required to be taken into consideration, the alleged recovery of opium did not fall within the ambit of non-commercial quantity and hence, the sentence should have been imposed regard being had to the non- commercial quantity and not commercial quantity. The High Court concurred with the view expressed by the learned trial Judge and proceeded to deal with the additional submission

and ultimately held that as the seizure had taken place on 23.12.1992, the amendment which has been brought into the Act in the year 2001 would not be attracted. Be it noted, the non-production of the scooter before the trial court was highlighted with immense vehemence but the learned Single Judge repelled the said submission being devoid of any substance and further directed confiscation of the scooter in question as envisaged under the provisions contained in Sections 60(3) and 63 of the Act. The aforesaid conclusions led to the dismissal of the appeal.

7. Questioning the legal substantiality of the judgment of conviction learned counsel for the appellant, has raised the following contentions: -

> i) It was incumbent on the part of the prosecution to examine the independent witnesses when the search and seizure had taken at a public place, i.e., in a 'dhaba' and not to rely exclusively on the official witnesses to prove the case against the accused.
>
> ii) There has been non-compliance of Section 50 of the Act as he had not been informed about his right to be searched in presence of a gazetted officer or a Magistrate and that vitiates the conviction.
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> iii) The High Court has fallen into serious error by not treating the seized opium failing within non-commercial quantity despite the report of the Forensic Science Laboratory that the morphine content contained in the sample was 1.66%.
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> iv) The non-production of the scooter creates an incurable dent in the foundation of the case of the prosecution and the said aspect having not been appositely dealt with by the learned trial Judge as well as by the High Court, the judgment of conviction and order of sentence are liable to be set aside.

8. Learned counsel for the State, resisting the aforesaid submissions, has advanced the following proponements: -

> a) The non-examination of independent witnesses in the case at hand does not affect the prosecution case, for there is no absolute rule that the prosecution cannot establish the charge against the accused by placing reliance on the official witnesses.
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> b) As the contraband goods have been seized from the tool box of the scooter and not from the person of the accused, Section 50 of the Act has no applicability.
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> c) The morphine content in the seized opium, in the case at hand, has no relevance to determine the commercial or non-commercial quantity regard being had to the fact that the occurrence had taken place in the year 1992 whereas the amendment was incorporated in the statute book in 2001.

d) The non-production of the scooter in the court cannot be a ground for setting aside the conviction since all the witnesses have specifically mentioned about the registration number of the scooter and there is no justification to discard their testimony.

9. As far as first submission is concerned, it is evincible from the evidence on record that the police officials had requested the people present in the 'dhaba; to be witnesses, but they declined to cooperate and, in fact, did not make themselves available. That apart, there is no absolute command of law that the police officers cannot be cited as witnesses and their testimony should always be treated with suspicion. Ordinarily, the public at large show their disinclination to come forward to become witnesses. If the testimony of the police officer is found to reliable and trustworthy, the court can definitely act upon the same. If in the course of scrutinising the evidence the court finds the evidence of the police officer as unreliable and untrustworthy, the court may disbelieve him but it should not do so solely on the presumption that a witness from the department of police should be viewed with distrust. This is also based on the principle of quality of the evidence weighs over the quantity of evidence. These aspects have been highlighted in State of U.P. v. Anil Singh[1], State, Govt. of NCT of Delhi v. Sunil and another[2] and Ramjee Rai and others v. State of Bihar[3]. Appreciating the evidence on record on the unveil of the aforesaid principles, we do not perceive any acceptable reason to discard the testimony of the official witnesses which is otherwise reliable and absolutely trustworthy.

10. The second plank of submission pertains to non-compliance of Section 50 of the Act. There is no dispute over the fact that the seizure had taken place from the tool box of the scooter. There is ample evidence on record that the scooter belongs to the appellant. When a vehicle is searched and not the person of an accused, needless to emphasise, Section 50 of the Act is not attracted. This has been so held in Ajmer Singh v. State of Haryana[4], Madan Lal v. State of H.P.[5] and State of H.P. v. Pawan Kumar[6]. Thus, the aforesaid submission of the learned counsel for the appellant is without any substance.

11. The third limb of submission pertains to determination of commercial and non-commercial quantity. The learned counsel for the appellant has commended us to the decision in E. Micheal Raj v. Intelligence Officer, Narcotic Control Bureau[7]. In the said case it has been held as follows: -

> "12. As a consequence of the Amending Act, the sentence structure underwent a drastic change. The Amending Act for the first time introduced the concept of 'commercial quantity' in relation to narcotic drugs or psychotropic substances by adding clause (viia) in Section 2, which defines this term as any quantity greater than a quantity specified by the Central Government by notification in the Official Gazette. Further, the term 'small quantity' is defined in Section 2, clause (xxiiia), as any quantity lesser than the quantity specified by the Central Government by notification in the Official Gazette. Under the rationalized sentence structure, the punishment would vary depending upon whether the quantity of offending material is 'small quantity', 'commercial quantity' or something in-between." After so stating, the two learned Judges proceeded to state that the intention of the legislature for

> introduction of the amendment to punish the people who commit less serious offence with less severe punishment and those who commit great crimes, to impose more severe punishment. Be it noted, in the said case, the narcotic drug which was found in possession of the appellant as per the Analyst's report was 60 gms., which was more than 5 gms., i.e., small quantity, but less than 250 gms., i.e., commercial quantity.

12. In the case at hand, the High Court has opined that as the opium was seized on 23.12.2992, the amendment brought in the statute book would have no applicability. It is also wroth noting that the appeal was preferred in the year 1996. In Basheer Alias N.P. Basheer v. State of Kerala[8] while dealing with the constitutional validity of the proviso to sub-section (1) of Section 41 of the Narcotic Drugs and Psychotropic Substances (Amendment) Act, 2001 (Act 9 of 2001), this Court upheld the constitutional validity of the said provision and opined thus: -

> "In the result, we are of the view that the proviso to Section 41(1) of the amending Act 9 of 2001 is constitutional and is not hit by Article 14. Consequently, in all cases, in which the trial had concluded and appeals were pending on 2.10.2001, when amending Act 9 of 2001 came into force, the amendments introduced by the Amending Act 9 of 2001 would not be applicable and they would have to be disposed of in accordance with the NDPS Act, 1985, as it stood before 2.10.2001."

13. Yet again in Nayak Ramesh Chandra Keshavlal v. State of Gujarat[9] a contention was raised that when the quantity seized is small one, as enumerated in notification bearing SO No. 1055 (E) dated 19.10.2001, published in the Gazettee of India (Extra), Part II, Section 3(ii) dated 19.10.2011, the punishment should be less. The Court, while repealing the said submission expressed as follows: -

> "Proviso to Section 41 of the amending Act referred to above, lays down that the provisions of the amending Act shall not apply to cases pending in appeal, validity of which was challenged before this Court on the ground that the same, being discriminatory, was violative of Article 14 of the Constitution. But this Court in the case of Basheer upheld the validity of the said provision and, consequently, the provisions of the Amendment Act shall have no application in the present case, as on the date of coming into force of the amending Act, the case of the appellant was pending in appeal before the High Court."

14. As in the case at hand, the appeal was pending in 1996, the ameliorative provision brought by way of amendment in the year 2001 would not be applicable to the accused-appellant. Therefore, the submission advanced by the learned counsel for the appellant is devoid of any substratum and, accordingly, stands rejected.

15. The last contention urged relates to the non-production of the scooter in the court. The learned counsel for the appellant has harped and hammered on this submission and we must say that the vehemence of the argument reflected in this regard is much ado about nothing. All the documents pertaining to the scooter were seized and the witnesses had stated in a categorical manner about the registration number of the scooter. From the material brought on record, it is crystal clear that the

scooter belonged to the appellant and the search and seizure was made in the tool box of the scooter. Under these circumstances, it can safely be concluded that the submission that the scooter was not produced in the court is entirely devoid of merit and, in fact, it amounts to an effort which is like building a castle in Spain. Thus, we unhesitatingly repel the aforesaid contention.

16. Resultantly, the appeal, being devoid of merit, stands dismissed.

.....J. [Dr. B. S. Chauhan] .....J. [Dipak Misra] New Delhi;

May 16, 2013

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[1] 1988 Supp SCC 686
[2] (2001) 1 SCC 652
[3] (2006) 13 SCC 229
[4] (2010) 3 SCC 746
[5] (2003) 7 SCC 465
[6] (2005) 4 SCC 350
[7] 2008 (4) SCALE 592
[8] (2004) 3 SCC 609
[9] (2004) 11 SCC 399
