HIGH COURT OF JAMMU AND KASHMIR AT JAMMU

Case: Cr. Appeal No. 19-A/2004 & Cr.M.P. No. 214/2004

Date: 21.02.2009

Sudarshan Bakaya and another Vs. State

Coram:

Hon'ble Mr. Justice Virender Singh, Judge.

Appearing counsel:

For appellant(s) : Mr. Sunil Sethi, Sr. Advocate, with Mr. Vishal Mahajan, Advocate.
For respondent(s) : Mr. P. C. Sharma, Addl. Advocate General.

Appellants- Sudarshan Bakaya aged 80 years and his wife Pushpa Devi alias Moong Phali aged 70 years (hereinafter to be referred as 'accused') stand convicted under Section 20(B) of the Narcotic Drugs & Psychotropic Substances Act (hereinafter for short to be referred to as 'the Act') and sentenced to undergo rigorous imprisonment for ten years each and to pay a find of Rs.1 lac each, in default thereof to further undergo rigorous imprisonment for one year each. They are stated to be in custody since the date of their conviction and also remained in custody as under trial prisoner for about 13-14 months.

In brief, the case of the prosecution is that on 15.09.1997, PW Mohd. Hussain Malik, the then Dy. SP (Bakshi Nagar Range) was on patrol duty, when at about 6 p.m. he received an information to the effect that both the accused who used to indulge in purchase and sale of charas, were keeping some charas in their residence. Finding the information to be reliable, he requisitioned the services of PW Kailash Chibber, the then SHO Police Station Bakshi Nagar and the police officials of Police Post Sarwal. He then raided the house of the accused

in presence of two independent witnesses namely Amrit Lal and Ravinder Paul, in which one kilogram and 50 grams of charas kept in the polythene from the bed of the accused was recovered. 50 grams of charas was extracted as sample and was sealed. The case of the prosecution is that it was handed over to the SHO at the spot. Recovery memo EXPW-MH was prepared in this regard by Mohd. Hussain Malik Dy. SP, which was also counter signed by the aforesaid two independent witnesses. A docket was sent to the Police Station Bakshi Nagar from the spot itself for the registration of a case, where upon a formal F.I.R. No. 238/1997 under Section 20 of the Act was registered against the accused. The sample was sent to the FSL and after the completion of the investigation, the challan was presented against both the accused under Section 20 of the Act, whereupon they were charged for the said offence.

The prosecution, in support of its case, has examined Tilak Raj SGC No. 794 who is a witness to the recovery, Dy. SP Mohd. Hussain Malik, the main investigating officer of the case, Mohd. Rashid Shaheen- Naib Tehsildar before whom the sample was produced for re-sealing and Kailash Chibber the then SHO Police Station Bakshi Nagar. Beside this, report of Forensic Science Laboratory (FSL) was also placed on record. It needs to be mentioned that it is not formally proved.

So far as aforesaid two independent witnesses are concerned, it is admitted before me by Mr. P. C. Sharma, learned State counsel and is

otherwise borne out from record also that Ravinder Paul was given up as his whereabouts were not known, whereas Amrit Lal was given up as not necessary.

Defence set up by both the accused is of their false implication simplicitor. However, no evidence was led by them.

Finding the case of the prosecution to be proved, the learned trial Court convicted and sentenced both the accused as indicated hereinabove vide impugned judgment dated 29.07.2004. Hence, this appeal.

I have heard Mr. Sunil Sethi, learned Sr. Advocate assisted by Mr. Vishal Mahajan, Advocate, representing both the accused and Mr. P. C. Sharma, learned Additional Advocate General. With their assistance, I have also gone through the trial Court record minutely.

Mr. Sethi at the very outset submits that in fact no recovery was effected from the accused as alleged and they have been falsely implicated. He contends that simply that Dy. SP, a senior police official was the person who was heading the raiding party and has projected himself as investigating officer of this case, that fact by itself cannot be said to be enough to believe the case of the prosecution as proved when it is otherwise stumbling badly on account of certain vital weaknesses in it. Mr. Sethi goes on to say that in order to give sanctity to the search, Dy. SP has shown the recovery in the presence of two independent witnesses namely Amrit Lal and Ravinder Paul Singh shown to be of the same locality, but evidence of Tilak Raj SGC demolishes this fact in his

statement. From his statement, it has come on record that Ravinder Paul Singh was resident of Rehari, which is at the distance of 1 kilometre from the place of recovery. Even otherwise, the presence of Ravinder Paul Singh becomes fishy for the reason that when he was summoned as a witness, his whereabouts were not known. So far as other witness-Amrit Lal is concerned, Tilak Raj SGC does not admit his presence at all. Therefore, it creates doubt about the presence of these two witnesses at the spot.

Raising doubt about the recovery as such, Mr. Sethi submits that no doubt Tilak Raj SGC projects himself to be a witness to recovery, but Dy. SP does not say a word about his presence at the spot at all and if one peruses the statement of Kailash Chibber, the then SHO Police Satition Bakshi Nagar, he does not talk a word about his presence at the spot. He simply projects himself to be an investigating officer who partly investigated this case, recorded the statements under Section 161 Cr.P.C., got the sample re-sealed from Executive Magistrate and then sent it to Forensic Science Laboratory (FSL). These discrepancies, according to learned counsel, go to the roots of the case so as to create doubt about the very case set up by the prosecution.

Another material weakness highlighted by Mr. Sethi is with regard to missing of the link evidence in this case. Dwelling upon his arguments on this aspect, he submits that after the alleged recovery it is not made clear as to when the sample and the remainder of the contraband was deposited with SHO of Police Station Bakshi Nagar.

The only evidence, which has been brought on record is that on 18.09.1997, Puran Chand SGC had produced one sealed packet marked 'B' before Mohd. Rashid Shaheen- Naib Tehsildar for re-sealing and the said packet was ultimately sent by Dy. SP Mohd. Hussain Malik to the FSL on 19.09.1997 alongwith a letter, which reached the hands of the Assistant Director FSL on 20.09.1997. The said sample was sent through Tajinder Singh SGC as is clear from the FSL report. Mr. Sethi submits that it was incumbent upon the prosecution to prove by producing cogent evidence on record, may be in the shape of affidavit(s) of concerned police official(s), who had handled the case property at different stages to show that the sample was not tampered with at any stage till it reached the hands of the examiner of FSL. In the case on hand, neither the Incharge of the Malkhana of Police Station Bakshi Nagar nor Puran Chand SGC, who brought the sample before Naib Tehsildar on 18.09.1997, nor SGC who took the sample to the FSL on 19.09.1997 have stepped into the witness box as prosecution witnesses nor their affidavits have been tendered to prove the link evidence in this regard and, therefore, possibility of tampering with the sample till it reached the hands of concerned official of FSL cannot be ruled out.

Mr. Sethi then submits that besides the aforesaid weaknesses, another glaring defect apparent on record is that in the FSL report, it is mentioned that *four pieces of green twisted sticks of charas* were received by the Assistant Director, whereas there is no mention of recovery of these green twisted sticks of charas from the place of

recovery as is clear from recovery memo exhibit EXPW-MH. In the recovery memo, it is only 50 grams of charas, which is shown to be extracted as sample. This ambiguity, if seen in the light of the aforesaid flaws, would again create suspicion with regard to the tampering with the sample. According to learned counsel, this aspect can be seen yet from another angle. When the sample was produced before the Naib Tehsildar, he just re-sealed it. What inscriptions the earlier seals were having, it is not made clear by the prosecution. The FSL report does not talk of seal inscriptions at all as no seal impression chit was sent to the FSL for cross-checking all the seals. Finding the seals to be intact gives us only one impression that when the sample reached the hands of the concerned FSL official, it was intact. But what happened in between right from 15.09.1997 upto 20.09.1997, nobody knows and, therefore, it cannot be said with certainty that the sample was not tampered with at any stage in between. If this flaw is seen further in the light of the fact that there is non-compliance of Section 55 of the Act in this case, this weakness becomes more damaging and does cause prejudice to the accused.

Mr. Sethi lastly submits that there is non-compliance of Section 42 of the Act, but has pressed this argument half-heartedly knowing that information was received by the Dy. SP, who was a gazetted officer.

On the basis of aforesaid submissions, Mr. Sethi prays for acquittal of both the accused.

Mr. Sharma, while supporting the conviction already suffered by the accused, submits that may be prosecution has not produced independent witnesses, that fact by itself would not demolish the case of the prosecution as a senior police official (Dy. SP) was the Incharge of the raiding party and there is no good reason to disbelieve his evidence, when he had no personal animosity with these two accused to falsely implicate them. Certain discrepancies in the statements of official witnesses, according to Mr. Sharma, do not make their presence doubtful. He then submits that no doubt there is non-compliance of Section 55 of the Act by Kailash Chibber, the then SHO Police Station Bakshi Nagar, but these provisions are not mandatory and their non-compliance cannot be said to be fatal to the prosecution. In the present case, the accused have not shown any prejudice caused to them on account of non-compliance of Section 55 of the Act.

Mr. Sharma, however, fairly admits the link evidence missing in this case, but according to him, it would not be fatal when the recovery is otherwise proved from the statement of Dy. SP Malik. Even the concerned official of FSL has also mentioned in his report that the seals were intact. Therefore, there could not be any chance of tampering with the case property. In the present case reasonably a good quantity of contraband is recovered from both the accused, therefore, they have no escape from their liability. The appeal on hand, thus, merits dismissal.

So far as non-compliance of Section 42 of the Act is concerned, I do not feel the necessity of entering into detailed discussion for the

reason that Mr. Sethi, learned counsel for the appellants himself has not urged this point vigorously and rather conceded that compliance of Section 42(1) and sub-Section (2) was not required in this case as the information received in this case was by a gazetted officer (Dy.SP) and he himself is the incharge of the raiding party. In case titled **'G. Srinivas Goud v. State of A.P.' 2005 (4) RCR (Criminal) 353**, their Lordships observed that wherever the provisions of Section 42 are attracted, their compliance is mandatory, but if the search, seizure and arrest is made by a gazetted officer without warrant, it is not necessary for him to comply with the provisions of Section 42 of the Act.

I, however, find substance in the contention of Mr. Sethi vis-à-vis joining of independent witnesses while effecting the search of the contraband from the house of the accused. The case set up by the prosecution is that the services of two independent witnesses namely Amrit Lal and Ravinder Paul were requisitioned. It has come on record that Ravinder Paul was resident of Rehari, which is at the distance of one kilometer from the place of recovery. He was ultimately not produced as prosecution witness as his whereabouts were not known. Amrit Lal is given up by the learned Public Prosecutor as an unnecessary. Tilak Raj- SGC, who has projected himself as a witness to the recovery at the spot does not admit the presence of Amrit Lal at the time of alleged recovery. Therefore, the only inference which can be drawn is that the presence of Amrit Lal at the spot is doubtful. Had the prosecution not joined any independent witness and relied upon the

statements of the official witnesses alone, some margin could be given to it in this regard, may be on the pretext that the statements of the official witnesses cannot be rejected simply on the ground that the independent witnesses have not been joined as it is not an uncommon feature and also noticed in many cases by the Courts that independent witnesses are reluctant in deposing in the Court. The factual position in the case on hand is entirely different. Despite the fact that there was no dearth of official witnesses in this case, Dy SP Malik in his wisdom thought of joining the aforesaid so called two independent witnesses, may be in order to show the compliance of Section 100(4) Cr.P.C., but has failed in his effort. Sub-Section (4) of Section 100 of Cr.P.C., provides that before making a search under this Chapter, officer or other persons about to make it, shall call upon two or more independent and respectable inhabitants of the locality in which the place to be searched is situate or of any other locality, if no such inhabitant of the said locality is available or is willing to be a witness to the search. Provisions of Section 51 of the Act provides that provisions of Code of Criminal Procedure shall apply to all warrants issued, arrests, searches and seizures made under the Act. From the record, I do not find that any effort whatsoever was made by the Dy.SP Malik in this regard. This creates suspicion about the recovery at the spot.

Not only the case of the prosecution is somewhat doubtful in the light of the aforesaid flaw, even the presence of the official witnesses at the spot appears to be doubtful. Tilak Raj-SGC projects himself to be a

witness to the recovery. Dy.SP Malik, who was the incharge of the raiding party does not say a word about his presence at the spot. Kailash Chibber, the then SHO Police Station Bakshi Nagar, demolishes the case of the prosecution rather more. He does not talk about his presence at the time of alleged recovery. He simply states that he had partly investigated the present case, recorded certain statements under Section 161 Cr.P.C., sent the sample to Executive Magistrate for re-sealing and then to the Forensic Science Laboratory. But for Dy. SP Malik no one else had signed the recovery memo EXPWMH. In the light of these discrepancies, even the presence of Tilak Raj-SGC as a witness to recovery is not free from doubt.

Even if some margin is extended to the prosecution on account of aforesaid infirmities, still it fails on a very vital flaw, which cannot be just ignored by this Court and the said flaw is missing of the link evidence. It is well settled that prosecution has to prove affirmatively that right from the stage of seizure till it reaches the hands of the chemical analyst, there should be no possibility to change or tamper with the material or the sample. If it is wanting, the prosecution case must fail. This view finds affirmation from a judgment of the Apex Court rendered in **'State of Rajasthan v. Daulat Ram' AIR 1980 SC 1314**.

Nobody knows in this case as to what was the seal inscription. Admittedly, no FSL form was prepared at the spot by the Dy. SP Malik, the investigating officer of this case, as is clear from the evidence on

record. There is no evidence on the file that the seal after use was handed over to any independent witness. The only evidence, which has been brought on record is that after three days of the alleged recovery, on 18.09.1997 Puran Chand-SGC had produced one sealed packet marked 'B' before PW Mohd. Rashid Shaheen- Naib Tehsildar for re-sealing and the said packet was ultimately sent by Dy. SP Malik on 19.09.1997 through Tajinder Singh-SGC and it reached the hands of the official of the FSL on 20.09.1997. Reaching of the sample through Tajinder Singh-SGC is indicated in the FSL report only, whereas Dy. SP Malik is silent in this regard. Whether the case property was deposited in Malkhana of Police Station Bakshi Nagar on 15.09.1997, the date of alleged recovery, it could be made clear either by Kailash Chibber, the then SHO or the incharge of Malkhana. Kailash Chibber does not say a word about it and no official of Malkhana has been produced by the prosecution to prove this fact. The matter does not rest here. Puran Chand-SGC, who had produced the sealed packet before the Naib Tehsildar for re-sealing has also not been produced by the prosecution. The matter still does not rest here. Even Tajinder Singh-SGC, who had taken the sample to FSL on 19.09.1997 has also not been produced.

I am appreciating the flaw of missing of link evidence, yet from another angle. When the sealed packet was produced before Naib Tehsildar for re-sealing, he simply checked the seals and put his own seal on that. It is not the case of the prosecution that all the seals earlier used for sealing the packet were broken by him and he had put his new

seal impression. When the sample reached the hands of the concerned official of FSL, he simply found the seals to be intact. Admittedly, no seal impression slip(s) were sent to him in the docket. In all eventualities, there should have been two different seals inscriptions on the sealed packet, one used at the time of alleged recovery and the other used by Naib Tehsildar. The report is silent about this aspect. Therefore, the possibility of tampering with the sample right from the stage of its first sealing till it reaches the hands of the concerned official of FSL, cannot be ruled out as by that time five days had elapsed. The link evidence is conspicuously missing in this regard. Had Dy. SP Malik, a seasoned police officer, taken some pain to prepare one seal impression slip at the time of sealing and deposited the same with the case property in the Malkhana, it could be cross-checked by Naib Tehsildar on 18.09.1997 and had Naib Tehsildar also prepared his separate seal impression slip, the concerned official of FSL would have tallied both seals with the seals inscriptions from two different seals impression chits. This would have clinched the entire issue and the accused could not take the advantage of missing of link evidence in the present case. Having that not being done by the prosecution agency, it certainly creates doubt in the mind of the Court with regard to the tampering of the sample in between.

Another flaw, which cannot be lost sight of, is that in the FSL report it is mentioned that *four pieces of green twisted sticks of charas* were received by the Assistant Director, whereas there is no mention of

recovery of these green twisted sticks in the recovery memo (EXPWMH). In the recovery memo, only fifty grams of charas is shown to have been extracted as sample. When this ambiguity is seen in the light of the aforesaid weakness in the link evidence, it weakens the case of the prosecution to a great extent.

Lt the aforesaid weakness be now appreciated in the present case with regard to the non-compliance of provisions of Section 55 of the Act also. No doubt, that non-compliance of the provisions of Section 55 by itself would not vitiates the case of the prosecution so as to extend acquittal as is well settled by now, but if such non-compliance causes prejudice to the accused, in that situation it can be said to be damaging one. In the present case, in my view, non-compliance of Section 55 of the Act does cause prejudice to the accused especially when the link evidence is missing in this case. The prosecution is not clear with regard to the deposit of the contraband in the police station and its safe custody till it was produced before the Magistrate. Kailash Chibber was the SHO Police Station Bakshi Nagar and within the jurisdiction of that police station the recovery was allegedly effected. The case property should have been produced before him alongwith accused and he was supposed to keep the same in his safe custody. He does not say a word in this regard. Therefore, non-compliance of Section 55 of the Act is writ large. This all creates lot of doubt about the complete link evidence and investigation conducted and, thus, causes prejudice. Had the prosecution taken all the safeguards with regard to link evidence like

filling of Form at the spot, putting the seal impressions on it and producing the witnesses who handled the sample at different stages, this situation would not have arisen.

Filling of F.S.L. form at the spot is a very valuable safe-guard to ensure that the seal sample is not tampered with till its analysis by the F.S.L. The FSL form in all respect should not only be prepared by the officer making seizure at the place where the case property is seized from the accused, it should also be kept in safe custody by the SHO to whom the sample and the case property is handed over and then the same should accompany the sample to Chemical Examiner for tallying the seals. The idea behind taking such a precaution is to complete the material link in the prosecution case by eliminating the possibility of the sample being tampered with at any stage. One should not forget that the stringent provision is provided under the Act where the sentence is very severe. It cannot be less than 10 years R.I. and a fine of Rupees one lac. Therefore, it is the duty of the Court to insist for the standard of proof beyond shadow of all reasonable doubt against the accused and to see that the investigation is not faulty at any stage. As observed hereinabove, the investigation in this case is very weak on vital issues.

Mr. Sethi has also pointed out certain discrepancies in the statements of the witnesses produced by the prosecution with regard to the presence of Pushpa Devi-accused at the spot, but I do not feel the necessity of delving deep into this aspect as I am doubting the case of the prosecution as it is on account of aforesaid weaknesses in it.

In my view, no other point is left untouched, which calls for discussion

As an upshot of the aforesaid discussion, the net result now surfaces is that the prosecution has not been able to prove the recovery of the contraband (charas) from the house of both the accused as alleged and by extending the benefit of doubt, I acquit them of the charge(s) framed. The judgment impugned herein is, thus, set aside and the appeal on hand is hereby allowed. Both the accused are stated to be in custody and they shall now be released forthwith, if not required in any other case. Registrar Judicial of this Court to take effective steps in this regard without any delay.

Before parting with the judgment, I wish to make certain suggestions with regard to some of the safeguards to be adopted by the investigating agency dealing with the cases under the Act. Link evidence, undoubtedly, plays a vital role. Any material lapse on the part of the prosecution on this count is being taken seriously by the Courts as it is the duty of the prosecution to prove that the sample(s) remained intact right from inception of the proceedings till its deposit with the Chemical Examiner.

The investigating officer should fill up Form at the time of effecting the recovery so that the same is deposited in the Malkhana alongwith the entire case property. The said Form should be produced before the Illaqa Magistrate/ Executive Magistrate as the case may be alongwith the case property and the accused on the following day as it

is the requirement of Section 52 of the Act, so that the investigation conducted till then is cross-checked. The Magistrate concerned may also put his own seal on the sample produced before him. The seal impression of the Court can also be put in one of the columns of the said Form which ultimately is to be sent to Chemical Examiner alongwith the sample so that he can also tally the seals from the seal impression(s) already put on the said form before opening the sample for testing. This way the chance of tampering with the sample shall be ruled out absolutely.

In most of the cases, it is noticed that the accused are benefited on account of certain lapses committed by the investigating agency. Therefore, it is very important that the police official handling the case under the Act, should be made aware of all the important safe guards to be followed strictly, may be, by imparting required training. Narcotic Control Bureau (NCB) officials should also keep a note of it. No doubt this all exercise is time consuming, but legislative intent should not be surpassed by evolving easy methods. A sincere effort made in this regard would certainly bring fruitful output and the Act will be able to achieve its goal to a great extent.

(Virender Singh)
Judge

Jammu
21.02.2009
'Narinder'