

CASE NO.:
Appeal (crl.) 1016 of 2006

PETITIONER:
Ritesh Chakarvarti

RESPONDENT:
State of Madhya Pradesh

DATE OF JUDGMENT: 29/09/2006

BENCH:
S.B. Sinha & Dalveer Bhandari

JUDGMENT:
JUDGMENT

S.B. SINHA, J.

Leave granted.

This appeal is directed against a judgment and order dated 24.1.2006 passed by the High Court of Madhya Pradesh at Indore in Criminal Appeal No. 484 of 2001 affirming the judgment of conviction and sentence dated 3.4.2001 passed by the Special Judge, Indore in Special Case No. 44 of 2000 under Section 8 of the Narcotics Drugs and Psychotropic Substances Act, 1985 (for short "the NDPS Act").

One Sabiha Khatun, an Inspector in Central Bureau of Narcotics (Bureau) received an information from an informer on 2.8.2000 that a person would carry around 15 kg. of opium from Indore to Mhow. The informer allegedly disclosed that the person carrying the contraband would be boarding a bus for Mhow at about 4.00 p.m. at Shivaji Vatika. The information was recorded in writing. S.K. Bajpai, Inspector and PW-5 Girwar Puri were witnesses thereto. Shivaji Vatika is almost on the other side of the Bureau. There was a pan shop just in front of the Bureau of which Girish (PW-2) was the owner. A raiding team was constituted which included Shri S.K. Bajpai, Inspector (who was then incharge of the office of the Superintendent of Police of the Bureau). Girwar Puri (PW-5) was also member of the said team. Appellant was allegedly seen proceeding to catch a bus for Mhow. He was seen having a black rexene bag in his hand. Girwar Puri, Sub-Inspector of the Bureau apprehended him. He was interrogated. He disclosed his name. He allegedly was given an option of search by a magistrate or a gazetted officer in terms of Section 50 of the NDPS Act or by the said PW-5. The search was conducted and opium weighing 1.300 kgs. was recovered. A currency note of Rs. 100 was also found on his person. A report was prepared purported to be in terms of Section 57 of the NDPS Act and was placed before the superior officer who was none other than the said Shri Bajpai. One Murali Dhamkani (PW-6) was appointed as an investigating officer. He was also a party to the raid.

Although information was received by Sabiha Khatun, she for reasons known only to the prosecution, was not examined. Inspector Shri S.K. Bajpai was also not examined. Both Premchand (PW-1) an autorickshaw driver and Girish (PW-2) owner of Pan shop, who were witnesses to the search, were declared hostile. The entire prosecution case rested on the testimony of Girwar Puri, Sub-Inspector.

The informer in his statement named Appellant stating:

"On 2.8.2000 at about 1300 hrs. during day time, the information from Mukhbir has been received that Ritesh Chakravorty, R/O 43, Tilak Nagar Extension, Indore will go to Mahu from Indore by bus. He will come at the Bus Stand near Shivaji Vatika holding about 1.500 kgs. Opium in a leather

bag at about 1600 hrs. during day time. Therefore, you may initiate appropriate proceeding and to arrest the accused."

Although names of Shri S.K. Bajpai, acting as Incharge of the Bureau and Girwar Puri were shown as departmental witnesses thereto, the following endorsement was made:

"The aforesaid officers have been acknowledged with the aforesaid information."

What was probably meant was that they were apprised of the report of the said information by Ms. Sabiha Khatun.

PW-1 Premchand in his deposition contended that his signatures had been obtained on blank papers. He was an autorickshaw driver. According to him, the search was not carried out in his presence. In answer to the questions put to him in cross-examination by the prosecution, it was stated:

"7. It is right to say that officers of Narcotic Department had intervened me at Shivaji Vatika A.B. Road. At this place no person namely Girish was intervened before me. It is wrong to say that officers of Narcotic Department told me that person namely Ritesh will come with opium who is to be caught."

8. I had not seen accused present in court at 5 o'clock with a bag in his hand at Shivaji Vatika. I had not seen on spot the accused present in court, before me accused was not interrogated."

The name of Appellant was, therefore, not disclosed to the said witness.

It is accepted that the office of Bureau was situated at Shivaji Vatika.

PW-2 Girish was the owner of the Pan Shop situated in front of CGO Complex which houses the Narcotics Department. According to him also, the departmental officials obtained his signatures on 3-4 blank papers. He also denied that any search was conducted or any seizure was made in his presence.

PW-5 is Girwar Puri. He disclosed that the investigation team is consisted of Inspector Bajpai, Inspector Murli Dhamkani (PW-6), Inspector Sabiha Khatun, himself, a few constables and a driver of government vehicle. They waited at the bus stop for about an hour, although the same was just in front of their office. The identity of Appellant had not been disclosed still then. Although a large number of persons might have passed through the road, Appellant alone was suspected and apprehended. How his identity came to be known is a mystery. A weighing scale was with the raiding party. A chemical kit was also being carried by them. Allegedly, statement of the accused was also recorded. A first information report was submitted to the Superintendent who was none other than the said Shri Bajpai, who indisputably was a part of the raiding team. It has not been disputed that the information from the informer was received by Ms. Sabiha Khatun. It was at about 1 O'clock in the noon. It is curious that PW-5 stated that he was also present at the time when the informer was making his statement before Ms. Sabiha Khatun although, as indicated hereinbefore, the information recorded by the said Sabiha Khatun was said to have been made known to the witnesses. According to PW-5, he was the only person present with Ms. Sabiha Khan but, if that be so, how Shri S.K. Bajpai also became a witness to the said document has not been explained. The informer was said to be present in the police station for 5 to 10 minutes only. PW-5 did not meet him thereafter. The description of accused does not appear to have been disclosed. He did have any talks with him in regard to the prize amount. He accepted that the office of the Bureau in CGO Complex is near Shivaji Vatika. Other offices are also there. There must have been several persons passing through the road. Why they had chosen the owner of the Pan Shop and an autorickshaw driver as witnesses has not been explained. Why nobody from

the public was called to be witness to the occurrence has also not been disclosed. PW-5 although stated that the weight of the opium being one and a half kg. as also the nature of the bag in which opium was kept (a leather bag) had been disclosed by the informer, he later on said that he had not told about the bag and nor had he disclosed that in which 'substance the opium was kept'. Whether the bag was a leather bag was also not remembered by the said witness. Interestingly, he stated:

"36. Sabiha madam had not asked informer from where he had got so many information. Himself told that informer was of Madam, therefore, later on he met with madam, he had no information regarding it. I have not asked the informer where he got known all these facts.

37. Ex. P/16 is that information which was given by informer to Madam Sabiha.

38. In Ex. P/16 information of informer, the fact of there would be a leather bag in which opium is concealed was not told before me, if it is told separately, I have no information regarding it. Neither B to B part "I may be given my prize" this fact was not told before me to Madam Sabiha."

He, however, at a later part of his cross-examination contradicted himself stating:

"40. Before me informer has told the weight of opium to be one to one and half kg. Before me it was not told that opium was about one and half kg. In Ex P/16 in C to C part about one and half kg opium is written but before me he told about opium to be between one to one and half kg. How it is written one and half kg. in C to C part, I cannot tell."

Whether the signature of the informer on the statement recorded by Ms. Sabiha Khatun was taken or not also was not known to him.

According to him, the informer before him did not say that the opium would be concealed in a leather bag. As regards the identity of the superior officer before whom the information was disclosed by Ms. Sabiha Khatun also is inconsistent, as it was stated:

"43. Before proceeding to spot from office, we have given information of our departure to Narcotic Superintendent Shri Ratanlal Goudia, then said that Madam might have given. Whether it was given in writing or orally, I have no information about it. I, on my own have not given information to my superior officer. Before proceeding Madame Sabiha had got acquainted with the informer's information to superior officer Shri Godia. Then said, at that time senior Inspector Shri S.K. Bajpai was in charge Superintendent and he was got acquainted with informer's information. This statement is made by witness after perusing Ex. P/16. I am stating this fact because on Ex. P/16 there are signatures of Bajpai Sahab."

He, thus, had to refresh his memory as who was the incharge of the office of the Superintendent from the document only which was exhibited as Ex. P/16.

He accepted that PWs 1 and 2 were called in office before proceeding to spot, by sending constable half an hour before they started. Admittedly, they had waited for half an hour to one and half hour at Shivaji Vatika and, thus, they must have called the witnesses at about 2.30 p.m. and left their office at about 3 O'clock. Strangely enough, it is PW-5 himself who had spotted the accused first. The accused was said to be only at a distance of 10 feet from where they had been standing.

Apart from spotting the accused, he searched him, recovered the contraband, interrogated him. He also carried out the sealing operations. Although a large number of people gathered, he did not enquire their names or asked them to be witnesses to the occurrence.

Why other officers and constables being present, all works were done only by him is difficult to perceive.

A doubt arises as to whether all the documents were signed at the spot without the same being kept on a table as it is accepted that all the exhibits including the signatures of the accused were in 'thick ink'. Signatures of the accused on the material exhibits were also obtained in 'thick ink' which does not appear to be probable.

Murli Dhamkani (PW-6) although was a part of the raiding team, in his deposition he did not utter a single word thereabout. Why he did not corroborate the statements of PW-5 is again difficult to understand. He was appointed an investigating officer but he neither had the occasion to examine any witnesses including the official witnesses nor did he perform any other job.

An offence committed under the NDPS Act is a grave one. Procedural safeguards to the accused provided under a statute require strict compliance. By reason of the provisions of the NDPS Act, Parliament has reposed confidence on the gazetted officers. Shri Bajpai being a Superintendent of Bureau was a gazetted officer. If he was present, it was expected that he would disclose his identity and would invoke his power under proviso to Section 42 of the NDPS Act.

Why everything was left to be done by PW-5 alone is a mystery. Why Shri Bajpai and Inspectors attached to the Bureau had not been examined has not been explained. The genesis of the occurrence was obtaining of secret information from the informer. Concededly the informer gave full particulars thereof only to Ms. Sabiha Khatun. She was, therefore, the only competent witness to prove the contents of Ex. P/16. A document as, is well known, does not prove itself. The contents are required to be proved by the maker thereof. Ms. Sabiha Khatun alone could have proved the correctness or otherwise of the contents of the said document. It was all the more necessary as PW-5 conceded that all conversations between Ms. Sabiha Khatun and the informer did not take place in his presence.

In a case under the NDPS Act, recovery of contraband in presence of the independent person assumes importance. The seizure witnesses, viz., PWs 1 and 2 cannot be said to be independent in that way. PW-2 was having a Pan Shop in front of the Bureau. Despite the fact that he was to carry on his business in front of the Bureau, he did not support the prosecution case. Why he was chosen to be a witness has not been disclosed. As noticed hereinbefore, PW-1 was an autorickshaw driver. A constable on duty ordinarily would not know him. Why PW-5 had sent for PWs 1 and 2 as search witnesses and that too half an hour before leaving the office has not been explained.

If it was a busy place, the officers would expectedly ask those to be witnesses to the seizure who were present at the time in the place of occurrence. But, not only no such attempt was made, even nobody else who had witnessed the occurrence was made a witness. Even their names and addresses had not been taken.

Illustration (g) appended to Section 114 of Indian Evidence Act reads thus:

"The Court may presume -

- (a) ***
- (b) ***
- (c) ***
- (d) ***

(e) ***

(f) ***

(g) that evidence which could be and is not produced would, if produced, be unfavourable to the person who holds it."

An adverse inference, therefore, could be drawn for non-examination of material witnesses.

Appellant has been gravely prejudiced by non-examination of Ms. Sabiha Khatun and Shri Bajpai. Moreover, if the seizure witnesses are to be believed, their signatures had been obtained on blank papers. In that view of the matter, seizure of the contraband becomes doubtful.

Ms. Vibha Datta Makhija, learned counsel appearing on behalf of the State, however, contended that it is not the quantity of evidence but the quality thereof which would matter. There is no dispute in regard to the aforementioned proposition of law; but if the procedural safeguards were required to be strictly complied with, there was no reason as to why the main prosecution witnesses should not be examined. It may be true that PW-5 in his evidence proved Ex. P/13 but then as indicated hereinbefore he has contradicted himself in material particulars. Whereas at one place he said that the informer made his statements in his presence; but at another place he stated that he was made only a witness to the document. If he was present throughout, we fail to see any reason as to why the entire statement was not made by the informer in his presence. Even as regards the weight of the contraband and the nature of the bag in which the same was to be carried stood contradicted. His evidence, thus, was inconsistent. He, therefore, in our opinion, is not a reliable witness.

Strangely enough, a suggestion was given to PW-1 that officers of the Bureau disclosed to him the name of the person who would carry the contraband; although from Ex P/16, it does not appear that even the informer had any knowledge as regards the name of the person concerned.

It was submitted that although PWs 1 and 2 were declared hostile, their signatures on the seizure documents had not been disbelieved. They categorically stated that their signature were obtained on blank papers and they were not witnesses to seizure. On the face of such statements made by the said witnesses, it was all the more necessary to examine all the departmental witnesses.

It may be that the articles seized had been sent for chemical analysis and were found to be analysed but that loses much of its significance as the prosecution must prove its case of recovery of the contraband beyond all reasonable doubt.

It was furthermore urged that Appellant has not been able to prove the defence raised by him. It was not necessary for him to do so. It was contended that the burden to prove the defence set up by him was on Appellant and he failed to discharge the same. In a case like the present one, the said submission cannot be appreciated. The prosecution was required to prove its case beyond all reasonable doubt. If the prosecution has failed to prove its case, it cannot fill up the lacuna by contending that Appellant has not proved its defence.

Our attention has been drawn to Section 103 of the Indian Evidence Act. The said provision has no application in this case. Appellant did not raise a plea of alibi. Plea of alibi by way of defence stands on a different footing. As and when such a defence is raised, ordinarily other defences are given up. Despite the provisions of Section 103 of the Indian Evidence Act, even if alibi is not proved, the prosecution cannot rest its case only in terms thereof. In other words, even if an alibi is not proved, the court

shall not record a judgment of conviction unless the prosecution is found to have established its case.

Furthermore, why PW-6 who was a part of the raiding party did not corroborate the statement of PW-5 is again a matter which raises a serious doubt about the veracity of the prosecution case.

He even was not required to carry on any further investigation as all the officers available at the Bureau had taken part in the raid and no other independent witness was to be examined. Furthermore, how the accused was identified is not known. How he could be singled out has not been explained.

In Jagdish v. State of M.P., [2003] 9 SCC 159, a Three-Judge Bench of this Court set aside a judgment of conviction where independent witnesses denied that search and seizure for recovery of opium took place in their presence. An adverse inference was further drawn as to why PW-1 Narcotic Sub-Inspector therein brought down only one passenger from the bus if he did not have any prior information or entertain any suspicion regarding involvement of Appellant therein being in possession or smuggling of opium.

In Bholu Ram Kushwaha v. State of M.P., [2001] 1 SCC 35, this Court although opined that only because witnesses have turned hostile, Appellant would be entitled to a judgment of acquittal as a matter of right, but having regard to the statements of prosecution witnesses inter alia to the effect that the police had called the witnesses in a police station and obtained their signatures on the paper and the statements of the independent witnesses that the accused was never interrogated and searched in their presence, the judgment of conviction and sentence was set aside.

The court should also take care of the fact that a person may not be convicted on a misguided suspicion. [See Gopal v. State of M.P., [2002] 9 SCC 595]

Although the effect of illegal search may not have any direct impact on the prosecution case but the same will have a bearing on the appreciation of evidence of the official witnesses and other materials depending on the facts and circumstances of each case. [See State of Punjab v. Balbir Singh., [1994] 3 SCC 299]

In a large number of cases, this Court as also various High Courts have emphasized the need of conducting a search in presence of independent persons. The law requires that such search should normally be conducted by a magistrate or a gazetted officer. Even presence of a gazetted officer in the raiding team would not subserve the requirements of Section 50 of the Act. [See Jadunandan Roy v. The State of West Bengal, (2000) CWN 373 and Harun Rashid v. State of West Bengal & Anr., (2005) 2 Cal LT 262].

There is another aspect of the matter which cannot be lost sight of. While dealing with a case of grave nature like the present one, there is always a danger that conjectures and suspicion may take the place of legal truth.

In Mousam Singha Roy and Ors v. State of West Bengal, [2003] 12 SCC 377, this Court held :

"It is also a settled principle of criminal jurisprudence that the more serious the offence, the stricter the degree of proof, since a higher degree of assurance is required to convict the accused."

In Sharad Birdhichand Sarda v. State of Maharashtra, [1984] 4 SCC 116, it was held :

"We can fully understand that though the case superficially viewed bears an ugly look so as to prima facie shock the conscience of any court yet suspicion, however great it may be, cannot take the place

of legal proof. A moral conviction however strong or genuine cannot amount to a legal conviction supportable in law.

It must be recalled that the well established rule of criminal justice is that "fouler the crime higher the proof⁵. In the instant case, the life and liberty of a subject was at stake. As the accused was given a capital sentence, a very careful, cautious and meticulous approach was necessary to be made."

In *Kashmira Singh v. State of M.P.*, AIR (1952) SC 159, it was observed:

"The murder was a particularly cruel and revolting one and for that reason it will be necessary to examine the evidence with more than ordinary care lest the shocking nature of the crime induce an instinctive reaction against a dispassionate judicial scrutiny of the facts and law."

In a case of this nature, the Court will move cautiously in view of the grave nature of the offence.

For the reasons aforementioned, we are of the opinion that Appellant is entitled to benefit of doubt. The appeal is allowed. He is directed to be set at liberty unless wanted in any other case.