

Before Hemant Gupta & Lisa Gill, JJ.

ANARI DEVI—Appellant

versus

STATE OF HARYANA—Respondent

CRA No.D-1106-DB of 2009

July 06, 2015

Narcotic Drugs and Psychotropic Substances Act, 1985 — S.20 and 29—Code of Criminal Procedure, 1973—S. 394—Indian Evidence Act, 1872—S.27, 30—Appellant No.1 apprehended from railway station—5 Kg 500 Gms charas recovered from her—Appellant No.1 suffered disclosure that she used to take charas from her neighbor (Appellant No.2) and same was handed over to Surender @ Pappu—Appellant No. 2 apprehended—Disclosure recorded—However, no recovery was effected—Trial Court convicted both appellants—Appeal preferred— Appellant No. 1 passed away in custody—Appeal qua her abated—Appeal allowed qua Appellant No.2—Held prosecution cannot lay foundation of its case against the accused on a disclosure statement made by the co-accused—Disclosure statement of co-accused cannot be raised to the level of substantive evidence—Section 30 of Evidence Act would not come to the aid to the prosecution—Section 27 of the Evidence Act permits the admissibility of that portion of the statement which leads to discovery of fact and at best can be relied upon as corroborative.

Held that it is a settled position that prosecution cannot lay the foundation of its case against the accused on a disclosure statement made by the co-accused in the case. Disclosure statement of a co-accused cannot be raised to the level of substantive evidence to form the basis of conviction of the accused. It can at best be relied upon to lend assurance or corroboration to other evidence available on record.

(Para 15)

Further held that admittedly there is no other evidence on record against appellant No. 2. Contention of the learned State counsel that Section 30 of the Evidence Act would come to the aid of the prosecution in this situation is untenable in the absence of any corroboration, hence does not merit acceptance.

(Para 16)

Further held that despite number of persons travelling in the train, none was associated at that time. It is an admitted position that no recovery was effected in pursuance to disclosure statement Ex. P4/A by appellant No. 2. Recovery of the contraband had already been effected from appellant No. 1, which is prior to the apprehension of appellant No. 2. Place of recovery was previously in the knowledge of the police. ½ kg charas, as mentioned in the said disclosure statement, was never recovered by the police. Section 27 of the Evidence Act which permits the admissibility of that portion of the statement of the accused which leads to discovery of the fact cannot be pressed into service by the prosecution in this case. In the present factual matrix, it would not be safe to rely upon the above said two disclosure statements in the absence of any other evidence on record to convict appellant No. 2. Evidence on record does not justify his conviction. It does not unequivocally point to the guilt of the accused. He is entitled to the benefit of doubt in this factual matrix.

(Para 17)

Anshuman Dalal, Advocate *for the appellant.*

Vivek Saini, AAG, Haryana

LISA GILL, J.

(1) Present appeal has been preferred by Anari Devi and Raj Kumar @ Raju Dube impugning the judgment and order dated 23.10.2009 and 26.10.2009 respectively passed by the learned Additional Sessions Judge-III, Bhiwani whereby they have been convicted for the offence punishable under Section 20/29 of the Narcotic Drugs and Psychotropic Substance Act (for short 'NDPS Act'), 1985 and sentenced to undergo rigorous imprisonment for a life besides to pay a fine of Rs.1,00,000/- and in default thereof to undergo simple imprisonment for six months.

(2) It is pointed out by Sh. Sandeep S. Mann, Senior DAG, Haryana that appellant No. 1 – Anari Devi has passed away in custody on 22.01.2010. Therefore, appeal qua appellant No. 1 –Anari Devi stands abated in terms of Section 394 Cr.P.C.

(3) Present appeal survives only qua respondent No. 2 – Raj Kumar @ Raju Dube.

(4) Brief facts of the case are that on 18.10.2008 ASI Manphool, PW10 was present at platform No. 3 railway station, Bhiwani alongwith other police officials on duty. Train No. 4519

arrived at the station and routine checking of the passengers was being carried out. A lady holding one white plastic bag (katta) in her right hand alighted from the train. On seeing the police party, she turned back and started walking briskly. She was apprehended on suspicion. She revealed her name to be Lilawati w/o Babu Lal resident of Padwana. She, however, disclosed her name to be Anari Devi on 20.10.2008 and resident of village Ram Nagar Billa, Hari Nagar and not of village Padwana as mentioned earlier. Notice under Section 50 of NDPS Act was served upon her expressing suspicion that she was carrying some contraband in a bag held by her and she had a right to get the search conducted before any other Gazetted Officer or a Magistrate. She opted for a search before Gazetted Officer. Consequently, PW5, Deputy Superintendent of Police (DSP) Randhir Singh Rana, HPS GRPS, Hisar was telephonically intimated to reach the spot alongwith his staff. Facts were disclosed to him. On his direction white bag held by appellant - Anari Devi was weighed and charas weighing 5 kg 500 gram was recovered. Two samples of 100 gram each were separated. Residue was put back in the same bag. Separate parcels of the residue and the samples were prepared and sealed with his seal 'RS'. DSP also affixed his seal 'HS' on all the parcels. Seal after use by ASI Manphool Singh was handed over to Head Constable Om Parkash. Seal was retained by DSP Randhir Singh. Parcels were taken in possession vide memo Ex. PW2/A. Ruka Ex. PA was sent to the Police Station through EHC Dhani Ram upon which FIR No. 172 dated 19.10.2008, Ex. PA/1, was registered by MHC Rohtash Kumar. Independent witness namely Sarjeet was associated with proceedings though he was given up as having been won over, thus not examined.

(5) Case property was deposited with MHC Police Post, GRP Bhiwani. Case property, samples, witnesses and accused were produced before SHO Satpal Singh on 19.10.2008 for verification. SHO Satpal verified the same and affixed his seal 'PR' on all the parcels. Accused alongwith sealed parcels were produced before Ms. Shashi Chauhan, JMIC, Bhiwani alongwith application under Section 52-A of the NDPS Act for certification of inventory. Her endorsement is Ex. PW6/B. A seal of monogram Rs. 5 coin was affixed by her on sample and residue. Photographs of the accused, Ex. P2, alongwith case property was taken in the Court room on her direction. Parcels were again deposited with MHC police post, GRP Bhiwani on the same day.

(6) Accused Anari Devi @ Lilawati suffered a disclosure statement, Ex. PW10/B on 20.10.2008 alleging that she used to take

charas from her neighbour named Raju (Raj Kumar) and the same was handed over to Surender @ Pappu resident of Mitathal. She was given Rs.1,000/- plus fare and expenses per trip by Raju.

(7) Appellant No. 2 - Raj Kumar @ Raju was arrested by ASI Manphool Singh on 26.10.2008. Raj Kumar – appellant No. 2 suffered disclosure statement Ex. P4/A on 27.10.2008 allegedly revealing that he had given 16 kg charas to the appellant Anari Devi alongwith two others for supplying it to accused Pappu @ Surender Singh. He kept concealed ½ kg charas with one of his relatives at Mainpuri for giving to Pappu and he can get the same recovered. However, no such recovery was effected.

(8) On completion of investigation, report under Section 173 Cr.P.C. was prepared by Satpal Singh, Inspector, SHO and presented. Charge was framed against Anari Devi for the offence punishable under Section 20 of the NDPS Act and against appellant No. 2 – Raj Kumar for the offence punishable under Section 20/29 of the NDPS Act on 24.02.2009 qua which they claimed trial.

(9) Prosecution examined 10 witnesses to prove its case. Accused while denying incriminating evidence put to them pleaded innocence and false implication in their statement under Section 313 Cr.P.C. No evidence was led in defence.

(10) Learned trial Court on appreciation of the evidence found that the prosecution had proved its case beyond reasonable doubt against the accused thereby convicting and sentencing them as detailed above.

(11) Learned counsel for appellant No. 2 submits that he has been falsely implicated in this case only on the basis of disclosure statement of the co-accused Anari Devi. There is no evidence on record pointing to the complicity of appellant No. 2 in this case. No recovery whatsoever was effected from the said appellant. Furthermore, disclosure statement Ex. PW4/A allegedly suffered by the appellant can also not be pressed into service by the prosecution as it is inadmissible in evidence. No recovery has been effected pursuant to this disclosure statement neither any fact has been discovered. Therefore, appellant No. 2 could not have been convicted on the basis of disclosure statement Ex. PW10/B by his co-accused or disclosure statement PW4/A by him.

(12) Learned counsel for the appellants has also addressed arguments on other aspects namely non-examination of the independent

witness even though stated to be present, delay in sending the samples for chemical examination and absence of link evidence which leads to inference with tampering of the samples. It is, therefore, prayed that sentence imposed upon appellant No. 2 being completely unjustified and illegally be set aside.

(13) Learned counsel for the State while refuting the above said arguments submit that there is ample and sufficient evidence on record, which justify the conviction and sentence imposed upon the appellants.

(14) We have heard learned counsel for the parties and gone through the record.

(15) In the case in hand, appellant No. 2 is admittedly nominated on the basis of disclosure statement Ex. PW10/B suffered by appellant No. 1 – Anari Devi. As per prosecution case, it is consequent to her disclosure that appellant No. 2 was arrested on 26.10.2008 from Bihar. It is candidly admitted by learned counsel for the State that there is no other evidence on record to link the said appellant with recovery. It is a settled position that prosecution cannot lay the foundation of its case against the accused on a disclosure statement made by the co-accused in the case. Disclosure statement of a co-accused cannot be raised to the level of substantive evidence to form the basis of conviction of the accused. It can at best be relied upon to lend assurance or corroboration to other evidence available on record. Reference in this respect can gainfully be made to a judgment of the Hon'ble Supreme Court in *Sidharth etc. versus State of Bihar*¹.

(16) Admittedly there is no other evidence on record against appellant No. 2. Contention of the learned State counsel that Section 30 of the Evidence Act would come to the aid of the prosecution in this situation is untenable in the absence of any corroboration, hence does not merit acceptance.

(17) Equally misplaced is reliance by the prosecution on Ex. P4/A i.e. disclosure statement allegedly suffered by appellant No. 2 himself. Appellant No. 2 is stated to be arrested from his residence at Bihar. However, ASI Manphool Singh, PW10 as well as PW4 ASI Rajinder Parshad have admitted that they did not know appellant No. 2 earlier. Co-accused Anari Devi did not accompany them to Bihar to identify appellant No. 2 – Raj Kumar. There is nothing on record to show that they had made the said journey or that they had informed the local police station as is required. No independent witness has been

¹ 2005 (12) SCC 545

joined at the time of arrest of appellant No. 2. As per the said two witnesses, appellant No. 2 was interrogated during the journey between railway station, Delhi to Rohtak and he suffered disclosure statement Ex. P4/A during the journey. Despite number of persons travelling in the train, none was associated at that time. It is an admitted position that no recovery was effected in pursuance to disclosure statement Ex. P4/A by appellant No. 2. Recovery of the contraband had already been effected from appellant No. 1, which is prior to the apprehension of appellant No. 2. Place of recovery was previously in the knowledge of the police. ½ kg charas, as mentioned in the said disclosure statement, was never recovered by the police. Section 27 of the Evidence Act which permits the admissibility of that portion of the statement of the accused which leads to discovery of the fact cannot be pressed into service by the prosecution in this case. In the present factual matrix, it would not be safe to rely upon the above said two disclosure statements in the absence of any other evidence on record to convict appellant No. 2. Evidence on record does not justify his conviction. It does not unequivocally point to the guilt of the accused. He is entitled to the benefit of doubt in this factual matrix.

(18) Recovery of contraband from the co-accused cannot be of any relevance in view of the facts narrated above. Contention of learned counsel for the State that the heavy quantity of contraband was recovered from appellant No. 1 and there is sufficient evidence to prove the said recovery cannot be of any relevance in respect to the specific case of appellant No. 2.

(19) Compliance of the mandatory provisions of the NDPS Act while effecting the recovery from appellant No. 1 cannot be of any use to the prosecution in respect to the case of appellant No. 2 which is entirely different and rests on a completely separate edifice. Complicity of appellant No.1 in the commission of the offence even if proved does not improve the prosecution case qua appellant No.2. Case of appellant No. 1 is entirely different but is not being considered in view of the fact that the appeal qua her stands abated on account of her death.

(20) Consequently, this appeal is allowed qua appellant No. 2 Raj Kumar @ Raju Dube. He is directed to be released forthwith if not required in any other case.

J.S. Mehndiratta