

Reserved Judgment

**IN THE HIGH COURT OF UTTARAKHAND
AT NAINITAL**

ON THE 22nd DAY OF FEBRUARY, 2021

BEFORE:

HON'BLE SHRI JUSTICE ALOK KUMAR VERMA, J.

GOVERNMENT APPEAL NO. 95 OF 2007

BETWEEN:

State of UttarakhandAppellant

(By Shri Atul Kumar Shah, learned A.G.A. and Shri Sachin Panwar, learned Brief Holder)

AND :

1. Akash Tyagi S/o Bhupendra Tyagi, R/o Nehru Nagar,
Police Station Gang Nahar, District Haridwar.
2. Mukhtiyar alias Tony S/o Riyajul Hasan R/o Paschimi
Ambar Talab, Police Station Gang Nahar, District
Haridwar.
3. Vipin Jain S/o Sheel Chand Jain R/o Mohalla Sorab
Gyan Kasba, Police Station Mangalaur, District
Haridwar.Respondents

(By Shri Siddhartha Singh, learned Advocate).

Reserved On: 20.02.2020
Delivered On: 22.02.2021

JUDGMENT

This Government Appeal is directed against the judgment and order dated 09.08.2004, passed by learned Additional Sessions Judge/IVth Fast Track Court, Haridwar in Sessions Trial No. 107 of 2003, " State Vs. Akash Tyagi and two others", whereby learned trial court acquitted the respondents-accused persons from the offence under Sections 193, 195 and 120B of I.P.C. and Section 18/20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as "Act, 1985").

2. Briefly stated the prosecution story as it emerges from re-appreciation of the evidence on record is that on 11.05.2003, Sub-Inspector Rohtash Singh, Constable Roop Singh and Constable Surendra Singh were on patrolling duty. They reached to the shop of Chaupali Ramdayal Namkeen at about 16:00 hrs. The respondent nos. 1 and 2 met police party and told that they had informed earlier about selling the drugs. They informed the police party that Doda Powder and intoxicating injections will be available at the shop of Gulsanawar. The Circle Officer was informed. On the way, they tried to associate public witnesses in the raiding party, but none joined. The police party with the respondent nos. 1 and 2 went towards Sher Singh Rana Chauk. At that time, one person entered Gulsanawar's shop, carrying a plastic bag in his right hand and went back keeping the said bag in the shop. The police party reached Gulsanawar's shop. Gulsanawar told that the bag was kept by Vipin Jain, the respondent no. 3. Meanwhile, other shopkeepers came there. On checking the said bag, 4 needle, 4 disposal syringe, 12 injections from two

packet, 30 packet Doda Post (opium powder) and 150 grams Charas were found. The people present there had told that the dispute of a house was going on between respondent no. 2 & Gulsanawar, and that bag was kept by the respondent no. 2 to trap Gulsanawar and the respondent no. 1 and respondent no. 3 were also involved in that conspiracy. The respondent no. 1 was strictly inquired. He confessed. The recovered contraband were sealed. A memo, Ext. Ka-1, was prepared. An F.I.R. Ext. Ka-2, was lodged against the respondents. The recovered articles were sent to the Forensic Science Laboratory, Uttar Pradesh, Agra for chemical analysis. On chemical analysis, the identity of the said articles have been established as, Charas and Opium powder. After completion of investigation, the respondents-accused persons were charge-sheeted.

3. The charges were framed under Sections 193, 195, 120-B of I.P.C. and Section 18/20 of the Act, 1985. The accused persons denied the charges and claimed to be tried.

4. In order to bring home the guilt of the accused persons, the prosecution examined as well as five witnesses.

5. Statements of the accused persons are recorded under Section 313 of the Code of Criminal Procedure, 1973, wherein they denied the entire evidence of the prosecution.

6. Learned trial court heard arguments, appreciated the evidences and held that the prosecution

has not been successful to prove its case against the accused persons beyond all reasonable doubt.

7. Heard learned counsel for both the parties.

8. Akash Tyagi, respondent no. 1, died on 06.05.2016.

9. Shri Atul Kumar Shah, learned A.G.A. submitted that there are no material or major contradictions in the testimony of the prosecution witnesses, which go to the root of the case; the case of the prosecution has not been viewed in right prospective; the recovered articles were sent to the Forensic Science Laboratory and according to the report of the said Laboratory, the recovered articles were found to be Charas and Opium powder; the guilt of the accused persons are fully proved and therefore, the order of acquittal is not justified in the eyes of law.

10. On the other hand, Shri Siddhartha Singh, learned counsel supported the impugned judgment.

11. The law is well settled that order of acquittal strengthens the presumption of the innocence of the accused. It is equally the duty of the court to see that the guilty do not escape punishment. Therefore, I have carefully assessed the evidences adduced by the prosecution.

12. Sections 191 and 192 of I.P.C. define the offences punishable under Section 193 of I.P.C. The first para of Section 193 applies to cases in which the false

evidence is given in a Judicial proceeding, the second para to all other cases. Section 195 of I.P.C. is an aggravated form of the offence contemplated under Section 193 of I.P.C.

13. PW3 Sub-Inspector Rohtash Singh was a member of the raiding party. PW4 Constable Brij Kishore is scribe of chik report, Ext. Ka-2, and PW5 Jodh Singh Adhikari is the Investigating Officer. After investigation, PW5 filed charge-sheet, Ext. Ka-5.

14. PW1 Ram Kohali, a shopkeeper, stated that at the time when he went to Gulsanawar's shop, a lot of people were present there and a box was in the hands of the police. According to this witness, he did not see the respondent no. 3 at Gulsanawar's shop.

15. According to the Prosecution, Gulsanawar signed the Fard (memo), Ext. Ka-1, at the spot, whereas, Gulsanawar stated in his cross-examination that he signed the Fard, Ext. Ka-1, at the police station. He stated that Rohtash Singh, Sub-Inspector, beat him and took him to the police station, whereas, Rohtash Singh, PW3 stated that he did not beat him nor took him to the police station. Therefore, there are glaring discrepancies in the evidences of the prosecution witnesses that give rise to suspicion of truthfulness of the witnesses of prosecution.

16. According to the prosecution, on the way to the place of recovery, the raiding party tried to associate public witnesses. But, the names of the persons who refused to be a witness had not been recorded. The

prosecution story is that a copy of the Fard, Ext. Ka-1, was given to the accused Akash Tyagi at the spot but the said copy of the Fard was not found during the search of the accused Akash Tyagi at the police station.

17. In ***State of Punjab vs. Baldev Singh, (1999)6 SCC 172***, the Hon'ble Supreme Court noticed ***Miranda vs. Arizona, 384 US 436*** in the following terms:

"30. In D.K. Basu case the Court also noticed the response of the Supreme Court of the United States of America to such an argument in *Miranda vs. Arizona* wherein that Court had said:

"The Latin maxim *salus populi suprema lex* (the safety of the people is the supreme law) and *salus reipublicae suprema lex* (safety of the State is the supreme law) coexist and are not only important and relevant but lie at the heart of the doctrine that the welfare of an individual must yield to that of the community. The action of the State, however, must be "right, just and fair".

18. A duty has been casted upon the officer-in-charge of the police station to take charge of the case property and to place it in safe custody. No evidence is produced by the prosecution that the officer-in-charge of the concerned police station had taken the charge of the case property of this matter and the said case property was kept in a safe custody. Therefore, in the instant case, there is non-compliance of Section 55 of the Act, 1985.

19. The recovered article was received by the Forensic Science Laboratory on 19.06.2003. There is no evidence whatsoever as to where the said article had been kept after the same was recovered. No evidence is produced as to where it was kept till it was produced in the court and no evidence is on the record when the said article was kept for safe custody. No evidence is produced that till the date the parcel of said article was received by the Forensic Science Laboratory, i.e. till 19.06.2003, the seal put on the said parcel was intact and there was no tampering with the seal at any stage and the article received by the Forensic Science Laboratory contain the same article which was recovered. No positive evidence is on the record to connect the forensic report with the substance that was allegedly recovered from the spot.

20. It is well settled that the provisions of the Act, 1985 being harsh in nature, the procedural safeguards contained therein must scrupulously be complied therewith.

21. In ***Gorakh Nath Prasad vs. State of Bihar, 2018(1) CCSC 28(SC)***, the Hon'ble Supreme Court held that the N.D.P.S. Act provides for a reverse burden of proof upon the accused, contrary to the normal rule of criminal jurisprudence for presumption of innocence unless proved guilty. This shall not dispense with the requirement of the prosecution to having first establish a prima facie case, only whereafter the burden will shift to the accused. The mere registration of a case under the Act will not *ipso facto* shift the burden on to the accused from the very inception. Compliance with statutory

requirements and procedures shall have to be strict and the scrutiny stringent. If there is any iota of doubt the benefit shall have to be given to the accused.

22. Going by the number of discrepancies in the prosecution case coupled with the contradictory statements by prosecution witnesses, the entire prosecution story vitiates and leads for discrediting its version. On a close scrutiny of the evidence, these discrepancies are found comparatively of a major character and go to the root of the prosecution case.

23. On a detailed examination and scrutiny of the evidence of the prosecution, this Court uphold the view taken by learned trial court. In my considered view, the prosecution has failed to establish the commission of alleged offence by the respondents-accused persons beyond all reasonable doubt. They deserve benefit of doubt. I am, therefore, in complete agreement with the view taken by learned trial court and see no reason to interfere with the judgment and order impugned herein.

24. As a result, the instant appeal is liable to be dismissed. The appeal is dismissed accordingly.

25. The respondents-Mukhtiyar alias Tony and Vipin Jain are directed to make compliance of Section 437-A of the Code of Criminal Procedure, 1973 within three weeks from the date of this order by appearing before the court concerned and execute a personal bond and two reliable sureties, each in the like amount to the satisfaction of the court concerned, which shall be effective for a period of six months.

26. Let a copy of this order be sent to the concerned court for intimation and compliance.

(Alok Kumar Verma, J.)

JKJ/Neha