

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.43 of 2015

ARISING OUT OF PS.CASE NO. -130 YEAR- 2009 THANA -GOVERNMENT OFFICIAL
COMP. DISTRICT- EASTCHAMPARAN(MOTIHARI)

(AGAINST THE JUDGMENT DATED 16.10.2014 AND ORDER OF
SENTENCE DATED 17.10.2014 PASSED BY LEARNED IST
ADDITIONAL SESSIONS JUDGE-CUM-SPECIAL JUDGE, EAST
CHAMPARAN, MOTIHARI IN TRIAL NO. 58 OF 2010 ARISING OUT OF
N.D.P.S.CASE NO. 130 OF 2009)

1. Santosh Kumar S/o Shri Swarup Singh, resident of village - Parasani, PO+PS-
Nadigaon, District- Jalaun (U.P.)
2. Sanjay Kushwaha, S/O Shri Kallu Prasad, Near Sabji Mandi, Behind Kalyan
Thana, Kanpur, (UP).

.... Appellants

Versus

The Union of India through the Commissioner, Custom, Patna.

.... Respondent

Appearance:

For the Appellants: Mr. S.P.Tiwari, Advocate
Mr. Anand Tiwari, Advocate
For the Respondent: Mr. Manoj Kumar Singh, CGC

CORAM: HONOURABLE MR. JUSTICE VIKASH JAIN

C.A.V. JUDGMENT

Date: 08-05-2015

Heard learned Counsel for the appellants and learned
Central Government Counsel for the respondents.

2. This appeal has been preferred against the
judgment of conviction dated 16.10.2014 and the order of
sentence dated 17.10.2014 passed by learned Ist Additional
Sessions Judge-cum-Special Judge, East Champaran, Motihari
in Trial No. 58 of 2010 arising out of N.D.P.S. Case No. 130 of
2009 for the offences under Section 20(b)(ii)(C) of the Narcotic



Drugs and Psychotropic Substances Act, 1985 (hereinafter the "N.D.P.S.Act" for short). The Appellants have been awarded punishment of rigorous imprisonment for ten years and a fine of Rs. 1,50,000/- each and on default of payment of fine, a further term of one year's simple imprisonment.

3. According to the prosecution report filed by the Superintendent, Customs (Preventive) Division, Motihari dated 15.03.2010, information was received by Sri Sanjay Kumar Mishra, Havildar in the night of 11.12.2009 at 20:30 hours, pursuant to which a preventive team was constituted in the supervision of Sri V.N.Mishra, Superintendent, Customs (Prev.) Division, Motihari which rushed to the concerned spot on NH 28A between Pipra Kothi and Dumariya Ghat and intercepted a covered truck bearing Registration No. UP-78BT-2794. The truck in question was brought to the Customs Office, Motihari for search. The search was made in presence of the Driver (Appellant No. 1) and the Khalasi (Appellant No. 2) and two independent witnesses, when 20 bales of Ganja like material were found concealed in different portions of the truck – 10 bales concealed in between the bags of edible makhana in the lorry and the remaining 10 bales concealed in the tool box of the lorry – in all weighing about 200 kg. (gross). The statements of the Driver and Khalasi were also recorded in presence of the independent witnesses and they accepted their



involvement in the illegal trade. Three samples of the material were drawn in presence of the independent witnesses, Driver and the Khalasi and the signatures of all the said persons along with L.T.I. of the Driver and Khalasi were taken on the packets of the drawn samples. One of the three samples was sent to the Laboratory for confirmatory test, report whereof was awaited. The entire materials comprising of 20 bales of ganja weighing 200 kg (gross) valued at Rs.4.00 lakhs along with 100 bags of edible makhana weighing 1350 kg valued at Rs.1,35,000/- and the covered truck valued at Rs.15,00,000/- were seized under the provisions of Act and follow-up action was also taken by way of summons to the owner of the edible makhana and the owner of the vehicle.

4. In order to prove the prosecution case, 11 witnesses were examined.

5. PW-1 Pranesh Kulkarni, Inspector Customs is the Investigating Officer who has supported the prosecution case stating that the truck in question was intercepted on the night of 11.12.2009 when the preventive team went to the spot on NH 28A between Pipra Kothi and Dumariya Ghat. On checking, 3 to 4 packets of ganja were seen on the truck. Thereafter, on the next day at about 12:15 P.M. search of the truck was made in the presence of the Driver and Khalasi of the truck as well as two independent witnesses when 20 packets of ganja were

found on the truck.

6. Other prosecution witnesses, such as PW-2, Sri Ravi Kumar, Inspector, Customs; PW-3, Sri V.N.Mishra, Superintendent, Customs; PW-4, Sri Sahdeo Baitha, Havildar, Customs, PW-5, Sri Sanjay Kumar Mishra, Havildar, Customs; PW-6, Sri Vishwanath Kumar, Havildar, Customs; PW-7, Sri Mukhtar Singh, Constable, Customs; PW-8, Sri Chandan Kumar, Constable, Custom; PW-9, Sri Randhir Singh, Constable, Customs, PW-10, Sri Pawan Kumar Shandilya, Inspector-cum-Godown Incharge, Customs and PW-11, Vijay Chandra Rai, Superintendent (Dispo.) Customs have all supported the prosecution case.

7. The defence has not adduced any witnesses, but has completely denied the prosecution version.

8. Learned Counsel for the appellants submits that the prosecution is a far cry from establishing the guilt of the accused. It is submitted that apart from serious contradictions with regard to the place of occurrence, time and quantity of seizure, even the mandatory provisions of the NDPS Act, and Sections 42(2), 52A and 55 thereof in particular, have been grossly violated which vitiates the entire evidence against the appellants. It was incumbent upon the officer concerned to have informed his immediate superior within the stipulated time of 72 hours with regard to the information received. The



entire operation commencing from the formation of the preventive team has been conducted only by the Customs authorities without the local Police having been informed nor involved at any stage whatsoever, which is in contravention of Section 52A and Section 55 of the NDPS Act.

9. It is further submitted that as regards the three samples drawn, it has not been stated either in the complaint or in the depositions of any of the prosecution witnesses whether the samples were taken separately from the several bales or the entire quantity was amalgamated or were simply drawn from one single bale. Moreover, the chemical examiner's report is also silent as regards the signatures of the independent witnesses said to have been taken on the packets of samples drawn, which creates considerable doubt with regard to whether the chemical examiner's report relates to the very samples which are said to have been drawn from the seized materials.

10. Learned Counsel for the appellants therefore submits that considering the gaping holes in the prosecution case, the conviction of the appellants cannot stand the test of appeal, more so when it is settled law that the standard of proof required is much stricter in cases involving the NDPS Act where the offences are of a more serious nature than other penal offences.



11. Learned Counsel for the respondents on the other hand submits that the order of conviction does not suffer from any illegality whatsoever and the appellants have rightly been convicted for the offence in question. It is submitted that offences under the NDPS Act are extremely serious in nature and for that reason a presumption of the existence of culpable mental state of the accused has been provided for under Section 35 of the NDPS Act. It is submitted that the recovery has been made from the truck after it was intercepted and the appellants are admittedly the Driver and Khalasi of the said truck. No fault can be found with the seizure of the offending goods in the presence of two independent witnesses.

12. Having regard to the facts and circumstances of the case, the submissions on behalf of the appellants, the materials on record as well as the provisions of the NDPS Act, I find myself unable to sustain the conviction of the appellants.

13. The inconsistencies and contradictions with regard to the seizure are apparent. In his deposition, the Investigating Officer Sri Pranesh Kulkarni, PW-1, has stated that at the time of intercepting the truck on NH28A on the night of 11.12.2009, 3-4 packets of ganja were detected by the preventive team. Thereafter, the truck was taken to the Customs warehouse and after midnight at around 0:15 A.M. the truck was searched in presence of two independent witnesses when 20 packets of



ganja were recovered from the truck. On the other hand the seizure memo discloses the time of seizure as 14.00 hours i.e. 2.00 P.M. on 12.12.2009. Again, the Superintendent, Customs (Preventive), Sri V.N. Mishra, who headed the preventive team has stated in para 7 of his deposition that on search being conducted on the morning of 12.12.2009 at the Custom Warehouse, only ten packets of ganja were recovered from the truck.

14. Non-compliance of the various statutory provisions of the NDPS Act is also writ large. There is nothing to show that the information said to have been received by the Customs Havildar was taken down in writing nor grounds for the requisite belief recorded, much less a copy thereof sent to the immediate superior officials within the prescribed period of 72 hours as contemplated under Section 42(2) of the Act, which has been given a complete go-by and even belated compliance has not been shown.

15. The Constitution Bench of the Supreme Court in **(2009) 8 SCC 539 Karnail Singh vs State of Haryana** has now decisively ruled that —

“While total non-compliance of requirements of sub-sections (1) and (2) of Section 42 is impermissible, delayed compliance with satisfactory explanation about the delay will be acceptable compliance of Section 42.”



16. Similarly, there is nothing also to show that the seized materials had been disposed of or inventorised or forwarded to the police station for safe custody in terms of Section 52A and Section 55 of the Act. Besides, the entire operation has been conducted by the officers of the Customs Department alone with reference to the police. In this context, the observations of the Hon'ble Supreme Court in **2003 (3) PLJR 276 (Hira Sah vs. the Union of India)**, are apposite, para 7 whereof reads as follows –

"In this Act such mandatory provision has been made because there is heavy punishment if a person is found guilty of offences under this Act. This provision of keeping the seized article after affixing seal in safe custody of police station has been made mandatory so that there shall not be addition to the article so kept in the custody in order to falsely implicate a person. That apart this mandatory provision has involved officer-in-charge of P.S. to take charge of the article so seized and not any other officer subordinate to him, certainly not custom officers."

17. In the above view of the matter, therefore, failure on the part of the authorities to produce the seized material before the Court as exhibit without adequate explanation for such failure would prove fatal to the prosecution case. The Hon'ble Apex Court in **(2013) 14 SCC 527 (Vijay Jain vs.**

The State of Madhya Pradesh) has held as follows —

"12. We are thus of the view that as the prosecution has not produced the brown sugar before the Court and has also not offered any explanation for non-production of the brown sugar alleged to have been seized from the appellants and as the evidence of the witnesses (PW 2 and PW 3) to the seizure of the materials does not establish the seizure of the brown sugar from the possession of the appellants, the judgment of the trial court convicting the appellants and the judgment of the High Court maintaining the conviction are not sustainable."

18. In **(2008) 16 SCC 417 (Noor Aga vs. State of Punjab and another)** it was observed that "the court must always remind itself of the well-settled principle of criminal jurisprudence that more serious the offence, the stricter is the degree of proof. A lighter degree of assurance, thus, would be necessary to convict and accused."

19. I am therefore of the view that various provisions of the Act requiring statutory procedures to be followed upon information being received with regard to any offence under the Act as well as handing over the seized materials to the local police for safe custody, which are mandatory in nature, have not been complied with. Equally, the non-production of the contraband goods by the prosecution by way of cogent

evidence in course of trial in order to establish that such goods were seized from the possession of the accused, also proves fatal and the conviction of the accused is not sustainable.

20. In the result the appeal is allowed and the impugned judgment of the trial Court in Trial No. 58 of 2010 arising out of N.D.P.S. Case No. 130 of 2009 is set aside. Since the appellants are in jail, they shall be released forthwith, if not required in connection with any other case.

(Vikash Jain, J)

A.F.R.
Chandran

U		T	
---	--	---	--