

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.781 of 2012

Arising Out of PS.Case No. -13 Year- 2009 Thana -Dhangaha District- MUZAFFARPUR

=====

1. Firoz Sheikh S/O Jarif Sheikh R/O Vill-Balua, P.S.-Sirahwa, Distt-Parsa, Nepal
..... Appellant/s

Versus

1. The State Of Bihar

..... Respondent/s

=====

Appearance :

For the Appellant/s : Mr. Ram Adya Singh, Advocate

Mr. Pramod Ranjan, Advocate

For the Union Of India: Mr. Manoj Kumar Singh, CGC

For the State : Mr. Abhimanyu Sharma, APP

=====

CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI

ORAL JUDGMENT

Date: 04-08-2015

This appeal is preferred by the sole appellant, Firoz Sheikh who has been found guilty for an offence punishable under Section 15 of the NDPS Act and sentenced to undergo RI for ten years as well as to pay a fine of Rs. 1 Lakh in default thereof, to undergo RI for six months, under Section 22(C) of the NDPS Act whereunder also, he has been directed to undergo RI for ten years and to pay a fine of Rs. 1 Lakh in default thereof, to undergo RI for six months with a further direction to run the sentences concurrently vide judgment of conviction dated 20.07.2012 and sentence dated 25.07.2012 inflicted by 1st Additional and Sessions Judge-cum-Special Judge, NDPS, West Champaran at Bettiah in Dhangaha PS Case No. 13/2009, Trial No. 29/2009.

2. While SSB Officers along with Sepoy were on



night patrolling, they saw a tractor along with trailer coming from Nepal, a foreign country, laden with gunny bags, over which they signalled the vehicle to stop. The driver stopped the vehicle and when he was interrogated, he disclosed his identity as Firoz Sheikh from Nepal. Further, on search, 10 quintals & 75 Kgs of Opium Bark kept in 53 bags were recovered and seized from the trailer. Although, there was no display of registration number, however, the driver disclosed the registration number of tractor bearing BR-20A-2120. However, no registration number was disclosed with regard to trailer. Seizure list was prepared followed with other paraphernalia relating to arrest, and then, accused along with seized articles including tractor and trailer were produced before the police along with written report submitted by an Inspector of SSB, namely, Gokul Chandra Dey, (PW-2) whereupon the O/C prepared production-cum-seizure list followed with registration of Dhangaha PS Case No.13 of 2009 under Section 20/22 of the NDPS Act. Investigation was taken up. Got the seized article scientifically examined by FSL, Patna and after conclusion of investigation charge-sheet was submitted whereupon, after cognizance trial commenced and concluded in a manner, subject matter of instant appeal.

3. The defence case, as is evident from mode of cross-examination as well as statement recorded under Section 313

Cr.P.C. is of complete denial. However, neither any DW nor any kind of document has been adduced on behalf of defence during course of trial.

4. The prosecution, in order to support its case, had examined altogether seven PWs out of whom, PW-1, Akinapatti Sampath, PW-2, Gokul Chandra Dey, PW-3, Soban Singh, PW-4, Narendra Kumar, PW-5, Idris Mian, PW-6, Altaf Mir and PW-7, Matiur Rahman.

5. The prosecution had also exhibited documents as Ext-1, 3 to 3/1, signature of witnesses over seizure list, Ext-2, written report, Ext-4, FSL report.

6. From the records, it transpires that PW-1 was partly examined on 24.06.2010 and his cross-examination was deferred to next date and since thereafter, he did not turn up for cross-examination on account thereof, his evidence loses its legal identity. It is also apparent that evidence of PW-5, Idris Mian and PW-7, Matiur Rahman are worthless though PW-5 was declared hostile because of the fact that their evidences are not at all concerned with the occurrence so alleged.

7. Now coming to evidence of remaining PWs, that means to say, PWs, 2, 3, 4 and 6, it is apparent that they happen to be inspector and Sepoy of SSB and during course of patrolling, they

intercepted tractor along with trailer laden with 53 bags of opium bark weighing 10 quintals 75 Kgs, apprehended accused and produced him along with seized article before the Investigating Officer.

8. At the present moment Ext-4, FSL report identifying the sample to be the narcotic substance has to be also taken note of. The learned lower court has found these materials sufficient to convict and sentence the appellant as disclosed above.

9. Before proceeding ahead, in order to verify whether the mandatory provisions of law have been complied with or not, Section 54 of the NDPS Act has to be taken note of, which is quoted hereinbelow:-

[54. Presumption from possession of illicit articles.— In trials under this Act, it may be presumed, unless and until the contrary is proved, that the accused has committed an offence under this Act in respect of—

(a) any narcotic drug or psychotropic substance or controlled substance;

(b) any opium poppy, cannabis plant or coca plant growing on any land which he has cultivated;

(c) any apparatus specially designed or any group of utensils specially adopted for the manufacture of any narcotic drug or psychotropic substance or controlled substance; or

(d) any materials which have undergone any process towards the manufacture of a narcotic drug or psychotropic substance or controlled substance, or any residue left of the materials from which any narcotic drug or psychotropic substance or controlled substance has been manufactured for the possession of which he fails to account satisfactorily.]

Because of the fact that opium bark was seized and as per definition prescribed under Section 2(xiv) “narcotic drug” means coca leaf, cannabis (hemp), opium poppy straw and includes all manufactured drugs;

“poppy straw” has been defined under Section 2(xviii). “poppy straw” means all parts (except the seeds) of the opium poppy after harvesting whether in their original form or cut, crushed or powdered and whether or not juice has been extracted therefrom;

10. In *Ajaib Singh v. State of Punjab 2000 Cr.L.J. 2270 (SC)*, the Hon’ble Apex Court has identified poppy husk falling under definition of poppy straw.

11. That means to say, the seized article, as has been disclosed happens to be within the meaning of narcotic drug and on account thereof, presumption though rebuttable in terms of Section 54 of the NDPS Act as referred above will come into play.

12. As stated above, all the material witnesses comprising PWs, 2, 3, 4 and 6 being SSB personnel stated only to the extent of arrest and seizure but, the aforesaid theme became doubtful in the background of non presence of appellant/accused over the seizure list and in likewise manner, over the production-cum-seizure list. Furthermore, all these witnesses are silent with regard to compliance of Section 42 (2) as well as Section 57 of the NDPS Act whereunder

such event has to be reported to the superior officer within 72 hours.

13. Another dark side of the prosecution case visualizes on account of non examination of the Investigating Officer and on account thereof, the prosecution is completely silent whether there happens to be compliance of Section 52A(2) as well as 55 of the NDPS Act. Furthermore, on account of non production of material exhibit before the court happens to be another serious deficiency which has got severe adverse impact on the authenticity of the prosecution case. The aforesaid failure makes further dent in the prosecution case as Ext-4, the report granted by FSL, Patna speaks regarding presence of report on 08.10.2009 while alleged occurrence happens to be on 15.07.2009 and there happens to be no explanation at the end of the prosecution as to why such delay has been caused and further on which date sampling was made and if so, in whose presence and further, after sampling storage of sample.

14. NDPS Act is an special Act imposing deterrent punishment against the offenders and that happens to be reason behind that certain mandatory provision has been incorporated to put safeguard upon the interest of an accused so that, he should not be victimized and, in case of utter violation of the aforesaid mandatory provisions of law, there happens to be consistent judicial pronouncements on this score forbidding the prosecution as well as

scrapping the conviction as well as sentences.

15. *In Sukhdeo Singh v. State of Haryana* as reported in **2013 AIR SC 953**, it has been held:-

13. Now, the question that arises for consideration is as to at what stage and by what time the authorized officer should comply with the requirements of Section 42 of the Act and report the matter to his superior officer. For this purpose, we must refer to Section 42 of the NDPS Act at his stage :

“Section 42—Power of entry, search, seizure and arrest without warrant or authorisation—(1) Any such officer (being an officer superior in rank to a peon, sepoy or constable) of the departments of central excise, narcotics, customs, revenue intelligence or any other department of the Central Government including para-military forces or armed forces as is empowered in this behalf by general or special order by the Central Government, or any such officer (being an officer superior in rank to a peon, sepoy or constable) of the revenue, drugs control, excise, police or any other department of a State Government as is empowered in this behalf by general or special order of the State Government, if he has reason to believe from persons knowledge or information given by any person and taken down in writing that any narcotic drug, or psychotropic substance, or controlled substance in respect of which an offence punishable under this Act has been committed or any document or other article which may furnish evidence of the commission of such offence or any illegally acquired property or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act is kept or concealed in any building, conveyance or enclosed place, may between sunrise and sunset,--

(a) enter into and search any such building, conveyance or place;

(b) in case of resistance, break open any door and remove any obstacle to such entry;

(c) seize such drug or substance and all materials used in the manufacture thereof and any other article and any animal or conveyance which he has reason to believe to

be liable to confiscation under this Act and any document or other article which he has reason to believe may furnish evidence of the commission of any offence punishable under this Act or furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act; and

(d) detain and search, and, if he thinks proper, arrest any person whom he has reason to believe to have committed any offence punishable under this Act:

Provided that if such officer has reason to believe that a search warrant or authorisation cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place at any time between sunset and sunrise after recording the grounds of his belief.

(2) Where an officer takes down any information in writing under sub-section (1) or records grounds for his belief under the proviso thereto, he shall within seventy-two hours send a copy thereof to his immediate official superior.”

14. Section 42 can be divided into two different parts. First is the power of entry, search seizure and arrest without warrant or authorization as contemplated under sub-section (1) of the said section. Second is reporting of the information reduced to writing to a higher officer in consonance with sub-section (2) of that section. Sub-section (2) of Section 42 had been a matter of judicial interpretation as well as of legislative concern in the past. Sub-section (2) was amended by the Parliament vide Act 9 of 2001 with effect from 2nd October, 2001. After amendment of this sub-section, the words “forthwith” stood amended by the words within 72 hours”. In other words, whatever ambiguity or leverage was provided for under the unamended provision, was clarified and resultantly, absolute certainty was brought in by binding the officer concerned to send the intimation to the superior officers within 72 hours from the time of receipt of information. The amendment is suggestive of the legislative intent that information must reach the superior officer not only expeditiously or forthwith but definitely within the time contemplated under the



amended sub-section (2) of Section 42. This, in our opinion, provides a greater certainty to the time in which the action should be taken as well as renders the safeguards provided to an accused more meaningful. In the present case, the information was received by the empowered officer on 4th February, 1994 when the unamended provision was in force. The law as it existed at the time of commission of the offence would be the law which will govern the rights and obligations of the parties under the NDPS Act. In the case of *Basheer @ N.P. Basheer v. State of Kerala* [(2004) 3 SCC 609: (AIR 2004 SC 2757)] wherein this Court was concerned with the Amending Act 9 of 2001 of the NDPS Act, the Court took the view of that application of the Amending Act, where the trial had been concluded and appeal was pending on the date of its commencement and where the accused had been tried and convicted, would not apply. The contention that trials were not held in accordance with law was not sustainable for the reason that there could be direct and deleterious consequences of applying the amending provisions of the Act to trials which had concluded in which appeals were filed prior to the date of Amending Act coming into force. This would certainly defeat the first object of avoiding delay in such, trials. Another Bench of this Court in the case of *Jawahar Singh alias Bhagat Ji v. State of GNCT of Delhi* ((2009)6 SCC 490): (AIR 2009 SC 2391) while dealing with the amendments of Section 21 of the NDPS Act, the Court took the view that amendments made by Act 9 of 2001 could not be given retrospective effect as if it was so given, it would warrant a retrial which is not the object of the Act. The Court held as under:-

“9. It is now beyond any doubt or dispute that the quantum of punishment to be inflicted on an accused upon recording a judgment of conviction would be as per the law which was prevailing at the relevant time. As on the date of commission of the offence and/or the date of conviction, there was no distinction between a small quantity and a commercial quantity, question of infliction of a lesser sentence by reason of the provisions of the amending

Act, in our considered opinion, would not arise.

10. It is also a well-settled principle of law that a substantive provision unless specifically provided for or otherwise intended by Parliament should be held to have a prospective operation. One of the facets of the rule of law is also that all statutes should be presumed to have a prospective operation only.”

15. No law can be interpreted so as to frustrate the very basic rule of law. It is a settled principle of interpretation of criminal jurisprudence that the provisions have to be strictly construed and cannot be given a retrospective effect unless legislative intent and expression is clear beyond ambiguity. The amendments to criminal law would not intend that there should be undue delay in disposal of criminal trials or there should be retrial just because the law has changed. Such an approach would be contrary to the doctrine of finality as well as avoidance of delay in conclusion of criminal trial.

16. Still, reference can be made to the judgment of this Court in the case of *Ravinder Singh v. State of Himachal Pradesh* [(2009) 14 SCC 201: (AIR 2010 SC 199)], wherein this Court was dealing with the question as to what would be the law applicable for imposition of a sentence irrespective of when the trial was concluded with reference to Article 21 of the Act and provision of the Punjab Excise Act, 1914 as applicable and amended by H.P. Act 8 of 1995 where punishment was enhanced and minimum sentenced was provided. The Court held that it is trite law that the sentence imposable on the date of commission of the offence has to determine the sentence imposable on completion of trial”.

17. Even in the case of *Hari Ram v. State of Rajasthan & Ors.* [(2009) 13 SCC 211: (AIR 2011 SC (Cri) 2053)], this Court stated with reference to the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2000 (as amended by Act of 2006) that the relevant date for applicability of the Act so as the age of the accused, who claims to be a child, is concerned, is the date of occurrence and not the date of trial.

18. In the present case, the occurrence was of 4th February, 1994. The Trial of the accused



concluded by judgment of conviction dated 4th July, 1998. Thus, it will be the unamended Section 42(2) of the NDPS Act that would govern the present case. The provisions of Section 42 are intended to provide protection as well as lay down a procedure which is mandatory and should be followed positively by the Investigating Officer. He is obliged to furnish the information to his superior officer forthwith. That obviously means without any delay. But there could be cases where the Investigating Officer instantaneously, for special reasons to be explained in writing, is not able to reduce the information into writing and send the said information to his superior officers but could do it later and preferably prior to recovery. Compliance of Section 42 is mandatory and there cannot be an escape from its strict compliance.

19. This question is no more *res integra* and stands fully answered by the Constitution Bench judgment of this Court in *Karnail Singh v. State of Haryana* [(2009) 8 SCC 539: (2009 AIR SCW 5265)]. The Constitution Bench had the occasion to consider the conflict between the two judgments i.e. in the case of *Abdul Rashid Ibrahim Mansuri v. State of Gujarat* [(2000) 2 SCC 513: (AIR 2000 SC 821)] and *Sajan Abraham* (*supra*) and held as under:-

“35. In conclusion, what is to be noticed is that Abdul Rashid did not require literal compliance with the requirements of Sections 42(1) and 42(2) nor did Sajan Abraham hold that the requirements of Sections 42(1) and 42(2) need not be fulfilled at all. The effect of the two decisions was as follows:

(a) The officer on receiving the information [of the nature referred to in sub-section (10) of Section 42] from any person had to record it in writing in the register concerned and forthwith send a copy to his immediate official superior, before proceeding to take action in terms of clauses (a) to (d) of Section 42(1).

(b) But if the information was received when the officer was not in the police station, but while he was on the move either on patrol duty or otherwise, either by mobile phone, or other means, and the information calls for immediate action and any delay would have resulted in the goods or evidence being



removed or destroyed, it would not be feasible or practical to take down in writing the information given to him, in such a situation, he could take action as per clauses (a) to (d) of Section 42(1) and thereafter, as soon as it is practical, record the information in writing and forthwith inform the same to the official superior.

(c) In other words, the compliance with the requirements of Sections 42(1) and 42(2) in regard to writing down the information received and sending a copy thereof to the superior officer, should normally precede the entry, search and seizure by the officer. But in special circumstances involving emergent situations, the recording of the information in writing and sending a copy thereof to the official superior may get postponed by a reasonable period, that is, after the search, entry and seizure. The question is one of urgency and expediency.

(d) While total non-compliance with requirements of sub-sections (1) and (2) of Section 42 is impermissible, delayed compliance with satisfactory explanation about the delay will be acceptable compliance with Section 42. To illustrate, if any delay may result in the accused escaping or the goods or evidence being destroyed or removed, not recording in writing the information received, before initiating action, or non-sending of a copy of such information to the official superior forthwith, may not be treated as violation of Section 42. But if the information was received when the police officer was in the police station with sufficient time to take action, and if the police officer fails to record in writing the information received, or fails to send a copy thereof, to the official superior, then it will be a suspicious circumstance being a clear violation of Section 42 of the Act. Similarly, where the police officer does not record the information at all, and does not inform the official superior at all, then also it will be a clear violation of Section 42 of the Act. Whether there is adequate or substantial compliance with Section 42 or not is a question of fact to be decided in each case. The above position got strengthened with the amendment to Section 42 by Act 9 of 2001.”

20. Having referred to the above settled principle of law, we are unable to accept the contention raised on behalf of the State and have to grant our approval to the submission made on behalf of the appellant.

16. That being so, on account of failure on the part of the prosecution to comply with the mandatory requirement of law as discussed above, mere assertion with regard to recovery of “poppy straw” in such a huge quantity is not going to put any kind of safeguard upon the prosecution case.

17. Accordingly, the judgment of conviction and sentence recorded by the learned lower court, is hereby, set aside. The appeal is allowed.

18. Since appellant is under custody, he is directed to be released forthwith if not wanted in any other case.

(Aditya Kumar Trivedi, J)

Patna High Court
August 04, 2015
perwez/AFR

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