

THE HONOURABLE SRI JUSTICE RAJA ELANGO

CRIMINAL APPEAL NO.1531 OF 2007

JUDGMENT:

1. This appeal is filed by the appellant-A2 against the conviction and sentence imposed by the I Additional Sessions Judge-cum-Special Sessions Judge for trial of Cases under the Narcotic Drugs and Psychotropic Substances Act, East Godavari District at Rajahmundry, vide judgment dated 15.11.2006 in S.C.No.20 of 2003.

2. Brief facts of the case are as follows:

On 26.12.2002 at about 2 p.m., the S.H.O., Prohibition & Excise Station, Prathipadu on receipt of telephonic information about the transportation of Opium on a motorbike by two persons from Tuni to Anaparthi side, along with P.W.2 and mediators proceeded to Vivekananda Statute Hill on NH 5 Road, Prathipadu and conducted the route watch under personal supervision of Assistant Excise Superintendent, Peddapuram. At about 3 p.m., they noticed two persons coming from Tuni towards Prathipadu on Hero Honda Motor bike and stopped them. Then, the driver of the bike tried to reverse the vehicle, but the raid party surrounded them and stopped them. They noticed a white colour plastic manure bag on the oil tank of the bike and another bag in between the driver of the motor bike and the pillion rider. When the raid party questioned them, they revealed their identity. Before the Mandal Executive Magistrate, the two bags were searched and found good quantity of Opium of 22 kgs. P.W.2 searched A1 and found cash of Rs.160/-. After following necessary formalities and on the basis of the mediators' report, P.W.2 registered a case for the offence under Section 17 r/w Section 8 (c) of

the NDPS Act. After completion of the investigation, charge sheet was filed against A.1 and A.2.

3. The learned trial Judge framed charge under Section 8 (c) r/w Section 18 of the NDPS Act, read over and explained to them for which they pleaded not guilty and claimed to be tried.

4. During the course of trial, P.Ws.1 to 4 were examined and Exs.P1 to P7 besides M.Os.1 to 6 were marked on behalf of the prosecution. No oral or documentary evidence was adduced on behalf of the accused.

5. On appreciation of both oral and documentary evidence, the trial Court found both the appellants-accused guilty for the offence under Section 8 (c) r/w Section 18 of the NDPS Act and hence, convicted and sentenced them to undergo rigorous imprisonment for a period of ten years each and to pay a fine of Rs.1,00,000/- each, in default to suffer rigorous imprisonment for a period of two years each. Aggrieved by the conviction and sentence imposed by the trial Court, A.2 filed the present appeal.

6. The learned Counsel for the appellant-A2 contended that the evidence of prosecution witnesses is contradictory and therefore, their evidence cannot be relied upon and that P.W.1-Ex-Sarpanch is a close follower of the police and therefore, his evidence is not trustworthy. He pointed out that there are procedural lapses in conducting raid and seizure of the contraband on the part of the prosecution. Therefore, the conviction and sentence imposed by the trial Court against the appellant-A2 are liable to be set aside.

7. The learned Public Prosecutor while supporting the judgment of the trial Court contended that the prosecution has proved the guilt of the

accused beyond all reasonable doubt and the trial Court has rightly convicted the appellant and therefore, the judgment under appeal does not warrant any interference by this Court.

8. P.W.1 was the Sarpanch. He deposed that he accompanied the raid party on their request to the place of occurrence. P.W.2 is the person, who conducted search and filed charge sheet. P.W.3 is the Superintendent, Prohibition & Excise, Rajahmundry. He also accompanied the raid party to the place of occurrence. He further deposed that in his presence, search was conducted and confessional statements were recorded. P.W.4 is the M.R.O., in whose presence search was conducted.

9. The trial Judge mainly placed reliance on the evidence of P.Ws.1, 2 and 4 and the FSL report, which reveals that the samples sent for analysis are Opium, while convicting the accused. The learned Counsel for the appellant raised several contentions not only on factual aspects but also on the legal aspects. He contended that there is violation of mandatory provisions under Section 42(2) of the said Act. Therefore, at this stage, it is just and necessary to go through the provisions of Section 42 (2) of the Act, which reads as follows:

“Where an officer takes down any information in writing under sub section (1) or records ground for his belief under the proviso thereto, he shall within 72 hours send a copy thereof to his immediate official superior.”

10. It is the case of the prosecution that on receipt of telephonic information, P.W.2 informed P.W.3, who is available in the police station and thereafter, he proceeded to conduct raid and seized the contraband.

11. In view of the provisions of Section 42 (2) of the Act, which is a mandatory one, mere information by P.W.2 to his superior officer-P.w.3

about receipt of telephonic information and his proceeding to raid, cannot be construed as that of compliance of the said provision.

12. Apart from that, in the instant case, it is an admitted fact that P.w.2 and also his superior-P.W.3 participated in the raid. But, the said raid is based on the oral information, so that they could not have reduced the same into writing, so as to send a copy of the same to the immediate superior officer of P.w.3. Even either P.W.2 or P.W.3 did not record any grounds for their belief of such telephonic information under the proviso thereto so as to send a copy of the same to their superiors. In these circumstances, this Court is of the view that it amounts to non-compliance of the mandatory provision of section 42 (2) of the Act and consequently, the subsequent proceedings, become vitiated. But, the trial Court has failed to consider all these aspects in its proper perspective and consequently, the conviction and sentence recorded against the appellant-A2 are liable to be set aside.

13. Accordingly, the Criminal Appeal is allowed setting aside the conviction and sentence imposed by the trial Court against the appellant-A2 in the above Sessions Case for the offence under Section 8 (c) r/w Section 18 of the NDPS Act. Consequently, the appellant-A2 is acquitted for the said charge. The fine amount paid, if any, shall be refunded to the appellant-A2. The bail bonds shall stand cancelled and the sureties are discharged.

JUSTICE RAJA ELANGO

29.08.2016
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