

**IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE**

Present:

The Hon'ble Justice Joymalya Bagchi

And

The Hon'ble Justice Ananya Bandyopadhyay

C.R.A. 196 of 2016

Subhas Debnath

-Vs-

Union of India

With

C.R.A. 118 of 2018

Umesh Kumar Pal @ Umesh Kumar & Anr.

-Vs-

Union of India

For the Appellant : Mr. Biswajit Manna, Adv.
In CRA 196/2016 : Mr. Santanu Talukdar, Adv.

For the Appellants : Mr. Arnab Nandi, Adv.
In CRA 118/2018 : Mr. Anirban Tarafdar, Adv.

For the UOI : Mr. Kaushik Dey, Adv.

Heard on : 07.07.2022

Judgment on : 07.07.2022

Joymalya Bagchi, J. :-

Both the appeals are directed against the judgment and order dated 24.02.2016 and 25.02.2016 passed by the learned Judge, Special Court, NDPS Act, Siliguri in C.R. (NDPS) Case No.16 of 2011

convicting the appellants for commission of offence punishable under Sections 20(b)(ii)(c)/29 of the NDPS Act and sentencing them to suffer rigorous imprisonment for 15 years each and to pay a fine of Rs.1,00,000/- each, in default, to suffer further rigorous imprisonment for one year each.

Prosecution case alleged against the appellants is as follows:-

DRI Officials attached to Siliguri Regional Unit under the leadership of S. P. Singh, Deputy Director in the midnight of 27th and 28th June, 2011 went to Fulbari Ghoshpukur by-pass road to work out a secret intelligence input that narcotic substance would be transported in a vehicle through the aforesaid road towards Berhampore. At about 9.20 A.M. on 28.6.2011 the team noticed a truck bearing registration mark BR-01GA-2583 coming from Fulbari side and heading towards Ghoshpukur. They stopped the truck. The truck was driven by Umesh Kumar Pal @ Umesh Kumar, appellant no.1 in CRA 118 of 2018 and Mukesh Kumar Pal @ Mukesh Kumar, appellant No.2 in CRA 118 of 2018 was his helper. On query the said appellants initially stated they were carrying household articles which were loaded at Jorhat, Assam to Kolkata. A set of documents with regard to the said articles were also produced. On further enquiry they confessed they were carrying a huge quantity of ganja concealed under the household articles. As the place was not conducive for search and seizure, the truck was brought to Central go-down of Nakshalbari Customs Division situated at State Warehousing

Corporation, Babupara, Siliguri. In course of search, 182 packets of ganja wrapped in plastic sheet concealed under the household articles were recovered. On weighment, net weight of ganja was found as 3667.37 kgs. The said consignment of ganja including the vehicle, household articles and other personal belongings of Umesh Kumar and Mukesh Kumar were seized under a seizure list which included inventory of seized goods as well as the weighment sheet. A detailed panchnama was also prepared. The aforesaid seizure was made in presence of independent witnesses viz., Paresh Mukherjee (PW9) and Sunil Kumar Singh (PW12). Notices were issued upon Umesh Kumar as well as Mukesh Kumar and their statements were recorded under Section 67 of the NDPS Act. Representative samples taken from the seized consignment were sent for examination by chemical examiner to Customs House, Kolkata and on examination it was found that the samples contained ganja.

Complicity of Subhas Debnath (appellant in CRA 196 of 2016) transpired from the statement of Umesh Kumar recorded under Section 67 of the NDPS Act. In his statement, Umesh Kumar stated one Abdul Jalil had told him to carry ganja in the vehicle and supply it to the aforesaid Subhas Debnath of Gopjan Colony, Paschim Para, Berhampore. A follow up enquiry was conducted at the residence of Subhas Debnath. Statement of his son Surojit was recorded in course of search enquiry. Notice was issued under Section 67 of the NDPS Act to Subhas Debnath but he did not respond. Enquiry also revealed

that the names of the consignor and the consignee of the consignment viz., Sanjoy Mondal and Arindam Roy respectively are fictitious. In conclusion of enquiry, complaint was filed against the appellants. Charges were framed under Section 20(b)(ii)(c) read with Section 29 of the NDPS Act. Appellants pleaded not guilty and claimed to be tried. In course of trial, prosecution examined 12 witnesses and exhibited a number of documents.

In conclusion of trial, trial judge by the impugned judgment and order dated 24.02.2016 and 25.02.2016 convicted and sentenced the appellants, as aforesaid.

Mr. Nandi with Mr. Tarafdar appearing for the appellants in CRA 118 of 2018 submits mandatory requirements of Section 42 and 50 of NDPS Act have not been complied with regard to the seizure in question. There were mistakes in the weighment chart and there was no authentication by the Court on the packets or envelope sent for chemical examination. It is further contended PW9 is a stock witness and PW12 had not supported the prosecution case. During their examination under Section 313 of the Code of Criminal Procedure appellants contended they had been illegally arrested from Fulbari truck parking area and implicated in the case.

Mr. Biswajit Manna with Mr. Talukdar appearing for the appellant in CRA 196 of 2016 submits there is no legally admissible evidence against his client. Statement of Umesh Kumar recorded under Section 67 of the NDPS Act is inadmissible in view of the law

declared in ***Tofan Singh Vs. State of Tamil Nadu***¹. It is further contended enquiry report (Ext.19) is not an admissible piece of evidence. Hence, conviction of the appellant is based on inadmissible evidence and is liable to be set aside.

Mr. Kaushik Dey, learned Advocate appearing for the Union of India submits 182 packets of ganja weighing 3667.37 kgs. were recovered from the truck driven by Umesh Kumar. His brother Mukesh Kumar was the helper. Recovery was made in presence of independent witnesses. Umesh Kumar and Mukesh Kumar admitted their guilt in their statements recorded under Section 67 of the NDPS Act. Such statements have not been retracted. Chain of custody of the seized articles has been duly proved and the chemical report Ext.13A show the seized consignment contained ganja. Complicity of Subhas Debnath transpired from the statement of Umesh Kumar, Ext.7 which is corroborated by the enquiry report marked Ext.19. Hence, the prosecution case against the appellants is proved beyond doubt.

Under the leadership of S. P. Singh (PW10), Deputy Director, Directorate of Revenue Intelligence, Siliguri Regional Unit, a group of DRI Officers i.e. PWs. 1 to 6 went to Fulbari-Ghoshpukur by-pass road to work out a secret intelligence input that a large consignment of ganja will be carried under the cover of household articles in a truck bearing registration No.BR-01GA-2583. It is contended the said

¹ (2021) 4 SCC 1

secret intelligence input was neither reduced into writing nor communicated to the superior officer as required under Section 42(2) of the NDPS Act.

In ***M. Prabhulal Vs. Assistant Director, Directorate of Revenue Intelligence***² the Apex Court held in the event the seizure is effected by a Gazetted officer, requirements of Section 42 of the NDPS Act need not be complied with. As the raiding team was led by S. P. Singh (PW10), Deputy Director, Directorate of Revenue Intelligence, Siliguri Regional Unit who is a Gazetted officer, ratio of the said report applies with full force to the facts of the case.

It is contended raiding party had searched the bodies of Umesh Kumar and Mukesh Kumar at the time of raid. However, requirements of Section 50 of the NDPS Act were not complied with. In this regard reference has been made to ***State of Rajasthan Vs. Paramanand***.³

It may be apposite to note apart from PW2 none of the other officers claimed search of the body of the said appellants.

That apart, recovery was made from a vehicle and not from their possession. Quantum of recovery is huge and by no stretch of imagination, the same could be said to have been recovered from the person of the said appellants. Explaining the ratio in ***Paramanand*** (supra) the Apex Court in ***Dayalu Kashyap Vs. State of***

² (2003) 8 SCC 449 (see para 8, 9 and 14)

³ (2014) 5 SCC 345

Chhattisgarh⁴ held when the recovery is made from a vehicle mere search of a person would not attract the requirements of Section 50 of the NDPS Act.

With regard to absence of authorization by Court on the envelope and the samples sent for chemical examination, I have gone through the evidence on record particular that of Ashim Kumar Saha (PW1) and Pankaj Kumar (PW2). PW2 deposed five sets of samples weighing 250 grams of ganja each were taken out from the seized contraband for chemical test. PW1 deposed that the sample packets were kept at the DRI Office and thereafter were sent to Customs House Chemical Laboratory, Kolkata. After testing the samples, they were returned in an envelope. He identified the said samples in Court. Test memo as well as report of the chemical examiner was proved as Exts.13 and 13A respectively without objection.

PW11, Santosh Pathak, Judicial Magistrate made physical verification and certified the inventory of the seized articles, Ext.22.

In view of the aforesaid unimpeachable evidence on record, I am of the opinion the chain of custody with regard to the seized articles and its examination by the chemical examiner has been proved beyond doubt.

Evidence of the official witnesses corroborate one another and inspire confidence. Their deposition is also corroborated by an independent witness, PW10. Mere suggestion that the said witness

⁴ 2022 SCC OnLine SC 334

had deposed in other cases without anything more would not improbabilise his version. The other independent witness (PW 12) was declared hostile and was extensively cross-examined. He, however, admitted his signatures on the seizure list, panchanama as well as the seized articles.

Umesh Kumar and Mukesh Kumar were the driver and helper of the truck which was carrying 182 packets of ganja weighing about 3667.37 kgs. The contraband was concealed under household articles. They were unable to give any explanation how the aforesaid huge quantity of ganja was found in the vehicle driven by them. Plea that the said appellants had been illegally arrested from the truck depot and falsely implicated appears to be a facile one which is not only demolished by the consistent prosecution evidence but the lack of corroboration of any independent evidence adduced by the defence. Manner in which the consignment of ganja was carried in the truck and the evasive defence taken by the appellants in CRA 118 of 2018 during trial clearly establish their conscious possession of the narcotic substance. In this regard the trial court has rightly applied the statutory presumptions under Sections 35 and 54 of the NDPS Act.

In light of the aforesaid discussion, I am of the opinion conviction and sentence of the appellants viz., Umesh Kumar Pal @ Umesh Kumar and Mukesh Kumar Pal @ Mukesh Kumar is liable to be upheld.

The appeal being CRA 118 of 2018 is accordingly dismissed.

Period of detention suffered by the appellants in CRA 118 of 2018 during investigation, enquiry and trial shall be set off against the substantive sentence imposed upon him in terms of Section 428 of the Code of Criminal Procedure.

Coming to the complicity of the appellant in CRA 196 of 2016, I am constrained to observe the conviction is not based on legally admissible evidence. Statement of Umesh Kumar recorded under Section 67 of the NDPS Act, (Ext.7) is the main plank of the prosecution case against the said appellant. In **Tofan Singh** (supra) the Apex Court by a 2:1 majority held officers empowered under section 53 of NDPS Act including DRI officers are deemed to be police officers for the purpose of section 25 of the Evidence Act and a confession made to such an officer by a person accused of an offence is inadmissible in law. In view of the aforesaid proposition of law, confessional statement of Mukesh Kumar to the DRI officers was inadmissible and could not have been used against Subhas Debnath, a co-accused. That apart, it is the confessional statement of a co-accused which at its height can only be used for corroboration.

Mr. Dey referring to enquiry report (Ext.19) strenuously argued that statement of Umesh Kumar is corroborated in material particulars. I am unable to accept his submission for the following reasons:-

- 1) Statement of Umesh Kumar, Ext.7 is inadmissible in law, as aforesaid;
- 2) Even the enquiry report (Ext.19) is a mere opinion of investigating officer and cannot be treated as substantive evidence;
- 3) Surojit Debnath whose statement is the foundation of the aforesaid report was not examined in Court.

Reliance on section 66 of NDPS Act to prove the aforesaid enquiry report or statement of Surojit Debnath is incorrect. The said provision of law creates a rebuttable presumption in favour of execution and truth of the contents of documents produced or seized from persons who are on trial or those received from abroad. Neither the aforesaid enquiry report nor the statement of Surojit were produced/seized from the appellant Subhas Debnath nor were they received from abroad. Thus, invocation of the aforesaid provision for proof of the said documents was clearly erroneous.

Under such circumstances, I am constrained to hold there is not even an iota of legally admissible evidence to implicate Subhas Debnath in the crime. In this backdrop, his failure to respond to the notice under Section 67 of the NDPS Act may give rise to some suspicion but cannot be the foundation to record a finding of guilt against him.

In the light of the aforesaid discussion, conviction and sentence of the appellant in CRA 196 of 2016 viz., Subhas Debnath is set aside.

Accordingly, the appeal being CRA 196 of 2016 is allowed.

Appellant viz., Subhas Debnath shall be discharged from his bail bond after expiry of six months in terms of Section 437A of the Code of Criminal Procedure.

Let a copy of this judgment along with the lower court records be forthwith sent down to the trial Court at once.

Photostat certified copy of this judgment, if applied for, shall be made available to the appellant upon completion of all formalities.

I agree.

(Ananya Bandyopadhyay, J.)

(Joymalya Bagchi, J.)

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