Item Nos. 55

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. 275 of 2018

With

CRAN 2 of 2018 (Old CRAN 3114 of 2018)

Gautam Sarkar
-Vs-
Union of India

For the Appellant	:	Mr. Amlan Jyoti Sengupta, Adv. Mr. Abhijit Pal, Adv.
For the UOI	:	Mr. Kaushik Dey, Adv.
Heard on	:	08.07.2022
Judgment on	:	08.07.2022

Joymalya Bagchi, J. :-

Appeal is directed against the judgment and order dated 30.01.2018 and 31.01.2018 passed by the learned Judge, Special Court, NDPS Act, Siliguri in C.R. (NDPS) Case No.10 of 2015 convicting the appellant for commission of offence punishable under Sections 20(b)(ii)(c)/29 of the NDPS Act and sentencing him to suffer rigorous imprisonment for 10 years and to pay a fine of Rs.1,00,000/-, in default, to suffer further rigorous imprisonment for three months more.

Prosecution case levelled against the appellant is as follows:-

On 2.1.2015 at 18.30 hours officers of Customs Preventive and Intelligence Unit received information from PW10 viz., Dilip Ghosh, Manager of M/s. Super Fast Courier, 15, Raja Ram Mohan Roy Road, Hakimpara, Siliguri that one Gautam Sarkar, Naxalbari booked two suspicious parcels of shoes for export to one Adrie Oostrom in Netherlands. He requested the officers to examine the parcels. Information was recorded in the movement register and under the leadership of Rajesh Kumar, Superintendent of Customs (PW1) the officers proceeded to the courier office. They examined the parcels along with the relevant shipment way bill No.4656459146 and other documents submitted with the courier service for booking the parcels. Voter identify card of Gautam Sarkar, invoice bill No.1206 dated 22.12.2014 in the name of M/s. Geeta Fashions, 2nd Mile, Sevoke Road, Siliguri for sale of 24 pairs of winter shoes in favour of aforesaid foreign national and certificate issued on behalf of M/s. Geeta Fashions signed by the said Gautam Sarkar were also verified. On opening the sole of one of the shoes, officers found a semi solid brownish substance wrapped in white thin transparent plastic inside an aluminum foil concealed in the cavity of the sole of the shoe. Being suspicious, the officers requested Dilip Ghosh to keep safe custody of the consignment. On the next day i.e. 3.1.2015 at 7.30 hours under the leadership of Sonam Gyatso Tenpa Bhutia (PW3), Superintendent of Customs, Officers went to the residence of the appellant. On enquiry, he admitted he had booked two parcels of shoes to Netherlands through M/s. Super Fast Courier of Siliguri a couple of days ago. He took the Customs Officers to the office of the said courier service. Dilip Ghosh and another staff identified the appellant as the person who had booked the aforesaid parcels. Thereupon, the parcels along with the appellant, the aforesaid Dilip Ghosh (PW10) and his staff Debasis Nandy (PW12) were brought to the Customs Office. In the presence of the appellant and others, 30 pairs of shoes were opened and it was found similar semi solid brownish substance wrapped in white thin transparent plastic inside aluminum foils were kept concealed in the false cavities of the soles of the said shoes. Preliminary test confirmed that the said substance was hasish/charas. Thereupon, the aforesaid hasish/charas weighing 5.960 kgs., a cash of Rs.17,200/- paid as freight charges for transportation of the parcels under a cash receipt No.8481 dated 23.12.2014 issued in favour of the appellant by M/s. Super Fast Courier against shipment way bill No.4656459146 and mobile handset of the appellant were seized. Two samples of 25 grams each were taken from the seized contraband for the purpose of testing. One of the samples was sent for chemical examination at the Laboratory at Kolkata. Statement of the appellant was recorded under Section 67 of the NDPS Act. He stated he received the shoes in a black travel bag, paper cartons, marker pen from one Narain Kharka of Kathmandu, Nepal, Deepak Sharma and another person called Bhagna. He packed the shoes in two paper cartons. On 20.12.2014 along with Bhagna he went to his friends viz., Manoranjan Dutta, Sujit and Prabir Dutta for booking the consignments in their name. They refused to do so. Thereafter on 23.12.2014 he booked the consignment through the aforesaid courier firm under the name of M/s. Geeta Fashions. He paid Rs.17,200/- for freight charges and cash receipt was issued in his favour. He handed over a copy of his voter's identity card to the courier firm for identification. In course of further enquiry, Rajesh Kumar (PW1) recorded the statement of one Anindya Chatterjee, Store Manager of M/s. Geeta Fashions under Section 67 of the NDPS Act. Anindya Chatterjee stated his firm only dealt in garments and accessories and denied the aforesaid booking of consignment. Inquiries were also made to verify the statement of the appellant and the roles of Manoranjan Dutta, Sujit and Prabir Dutta. Inquiries with regard to mobile phone conversations between appellant and the aforesaid Deepak Sharma and Bhagna did not yield fruitful result. The said persons could not be traced. Sim card of said Deepak Sharma appeared to have been obtained by fraudulent means in the name of one Biswanath Bhattacharyya. Report of the chemical examiner was received which confirmed that the seized contraband as hasish. In conclusion of inquiry, PW1 submitted complaint before the Special Court and charges under Section 20(b)(ii)(C)/29 of the NDPS Act were framed against the appellant.

To prove its case prosecution examined 12 witnesses and exhibited a number of documents. Defence of the appellant was one of innocence and false implication.

In conclusion of trial, trial judgement by the impugned judgment and order dated 30.01.2018 and 31.01.2018 convicted and sentenced the appellant, as aforesaid.

Mr. Amlan Jyoti Sengupta appearing for the appellant submits prosecution has failed to examine vital witnesses. Consignment was booked in the name of M/s. Geeta Fashions. Statement of its store Manager, Anindya Chatterjee was recorded under Section 67 of the NDPS Act during inquiry. The said Anindya Chatterjee was not examined as a witness. On the other hand, liability has been illegally foisted upon the appellant. He contends entire search and recovery of hasish concealed in the soles of 30 pairs of shoes is shrouded in mystery. No records with regard to previous intimation by Dilip Ghosh were produced in court. No explanation is forthcoming why the parcels were kept in the custody of said Dilip Ghosh, Manager of M/s. Super Fast Couriers. Sole of one of the shoes was cut and the contraband was recovered behind the back of the appellant. There is no compliance of Sections 42, 50 and 55 of NDPS Act with regard to the recovery. He also submits the seized contraband was not produced in court. No representative samples were drawn at the time of making inventory by the Magistrate under Section 52A of the NDPS Act. Finally, it is argued go-down register was not produced and the persons who carried the sample for chemical examination has not been examined. Hence, chain of custody of sample drawn from the contraband and the one tested in the laboratory is broken. Appeal is liable to be allowed.

Mr. Kaushik Dey appearing for the Union of India submits a consignment of shoes in two parcels were booked for export to Netherlands by the appellant. Dilip Ghosh (PW10), Manager of the courier service identified the appellant in course of inquiry as well as in court as the person who booked the parcels. Appellant paid a sum of Rs.17,200/- for freight charges and cash memo was issued in his favour. Invoice was purportedly made in favour of M/s. Geeta Fashions whose Manager claimed they were in no way connected with the consignment. Being alerted by Dilip Ghosh, Customs Officers initially checked the consignment on 2.1.2015. On the next day, they went to the residence of the appellant who admitted to have booked the consignment through the aforesaid courier. Thereafter, the parcels were taken to the Customs House and recovery was made in presence of the appellant. Independent witnesses Dilip Ghosh (PW10) and Debasish Nandi (PW12) have corroborated the prosecution case. Chemical report (Ext.18/1) shows that the seized consignment contained hasish. Prosecution case is proved beyond doubt.

PWs.1, 2, 3, 4, 7 and 8 are officers of Customs who participated in the recovery of narcotic substance i.e. 5.960 kgs. of hasish concealed in soles of 30 pairs of shoes which were booked for export to a foreign buyer in Netherlands through M/s. Super Fast Couriers. PWs5 and 9 are Habildars who accompanied the said officers in the operation while PW6 was the driver who took the officers to the office of M/s. Super Fast Couriers on 3.1.2015.

PW1, Rajesh Kumar deposed on 2.1.2015 around 6.30 P.M. they received intelligence from one Dilip Ghosh, Manager of M/s. Super Fast Courier with regard to his suspicion regarding two parcels booked by one Gautam Sarkar for export to Netherlands. The information was recorded in the movement register and he proceeded along with other officers to the office of the said courier firm. They inspected the consignment as well as relevant documents like invoice and cash memo issued in favour of Gautam Sarkar. Voter's identity card of Gautam Sarkar kept with the firm for identification was noted. Sole of one of the shoes was cut open and brownish sticky substance was found concealed therein. Being suspicious, the officers requested Dilip Ghosh to keep safe custody of the articles and on the next day under the leadership of another Superintendent viz., S. G. T. Bhutia (PW3), the officers went to the residence of the appellant for inquiry. Appellant admitted to have booked the parcels through M/s. Super Fast Couriers. He came to the courier office and was identified by the Manager and his staff. Thereafter, the parcels were removed to Customs House. In presence of the appellant and independent witnesses 5.960 kgs. of hasish concealed in the soles of 30 pairs of shoes was recovered.

PW2, Gyanendra Kumar Singh was the seizing officer who prepared the seizure list as well as the inventory list with regard to the aforesaid recovery. He also took samples from the seized contraband which were kept in envelopes signed by the appellant and the witnesses. One of the samples was sent for chemical examination.

Statement of the appellant was recorded by PW7, Palzor Tshering Yolmo and PW8, Phurba Wangdi Bhutia submitted a preliminary seizure report with regard to aforesaid recovery.

In course of inquiry, statements of Manoranjan Dutta, Sujit Biswakarma and Prabir Dutta of Shri Om Enterprises were recorded. They did not corroborate the statement of the appellant.

Statement of Anindya Chatterjee of M/s. Geeta Fashions was recorded. He stated his firm is not dealing in shoes. He denied having booked the aforesaid consignment under the said invoice.

Dilip Ghosh, Manager of the firm was examined as PW10. He corroborated the official witnesses. He deposed one person had come to the office on 23.12.2014 and booked the aforesaid consignment of shoes for export to Netherlands. The said person had paid the freight charges and cash memo was issued in his favour. He had handed over a copy of the Voter's Identity Card for identification. Invoice was prepared in the name of M/s. Geeta Fashions with regard to the consignment. He was present when the recovery was made and proved his signatures on the inventory, seizure list and other documents. He identified the appellant as the person who had booked the said consignment.

Debasis Nandy, a staff of the courier services was examined as PW12. He has corroborated the deposition of Dilip Ghosh and identified the appellant in court.

PW11, Mr. Nilanjan Maulik, Judicial Magistrate deposed he held inventory of the seized articles. He certified on the inventory list which was exhibited as Exts.19 & 19/1.

From the aforesaid evidence on record it appears on intelligence received from Dilip Ghosh with regard to suspicious export of two parcels of shoes to Netherlands, PW1, Superintendent of Customs along with other officers went to the office of the courier services for verification. On opening the sole of one of the shoes, they found brownish sticky substance which appears to be Hasish. They also verified documents which showed one Gautam Sarkar had come to the courier services to book the consignment. On the next day, they went to the residence of the appellant and brought him to the office of the courier service. Dilip Ghosh, manager of the courier service identified him as the person who had booked the consignment. Subsequently, the parcels were brought to the Customs house. In the presence of the appellant, soles of 30 pairs of shoes were cut open and 5.960 kgs. of Hasish concealed therein was recovered.

Mr. Sengupta submits there was non-compliance of mandatory requirements to Section 42 of the NDPS Act.

From the aforesaid discussion, it appears that the raids on both dates i.e. 02.01.2015 & 03.01.2015 were conducted under the leadership of Rajesh Kumar (PW1) and S.G.T. Bhutia (PW3), Superintendent of Customs who are Gazetted officers. As the recovery of the parcels were made by the raiding team in presence of PWs.1 & 3 who are Gazetted officers, non-compliance of Section 42 of the NDPS Act does not vitiate the exercise. In this regard, reference may be made to ***M. Prabhulal vs. Asst. Director, Directorate of Revenue Intelligence***[1].

Mr. Sengupta's argument with regard to non-compliance of Section 50 of the NDPS Act is also misplaced. The contraband was recovered not from the person of the appellant. It is the prosecution

[1] (2003) 8 SCC 449

case that appellant had booked two parcels containing 30 pairs of shoes for export to a foreign buyer in Netherlands wherefrom 5.960 kgs. of Hasish was recovered concealed in the soles of the said shoes. As the present case is not one where narcotic was recovered from the person of the accused, Section 50 of the NDPS Act does not apply.

In view of the aforesaid discussion, I am of the opinion recovery of 5.960 kgs. of Hasish concealed in the soles of 30 pairs of shoes booked by the appellant for export to a foreign buyer was in accordance with law and not vitiated by non-compliance of any mandatory requirement under the NDPS Act.

Mr. Sengupta strenuously argues invoice with regard to the seized consignments stood in the name of M/s. Geeta Fashions, hence appellant cannot be made liable for booking the said consignment

Evidence on record particularly that of Dilip Ghosh, store Manager (PW10) and staff viz. Debasis Nandi (PW12) unequivocally show on 23.12.2014 appellant had come to the office of M/s. Super Fast Courier and booked the consignment. He handed over a sum of Rs.17,200/- as freight charges and cash memo was issued in his favour. A Voter’s Identity Card of the appellant was also recovered from the courier office as proof of identity. PWs.10 & 12 identified the appellant in court as the person who booked the said consignment. Ocular version of the said witnesses is corroborated by documents recovered from the courier office namely, cash memo issued in the name of the appellant as well as his Voter's Identity Card. These evidence have remained unshaken during cross-examination. No explanation with regard to recovery of Voter's Identity Card of the appellant from the office of the courier service has been offered by the appellant during trial.

Hence, I am of the opinion there are strong and convincing evidence which proves on 23.12.2014 appellant had come to the office of the courier firm and booked the consignment wherein Hasish was concealed.

Mr. Dey argued appellant had fraudulently booked the invoice in the name of M/s. Geeta Fashions. In support of his contention he referred to the statement of Anindya Chatterjee, Store in-charge of the said firm. Mr. Chatterjee claimed the firm did not deal in shoes and they had not booked the seized consignment.

I am constrained to observe in view of non-examination of Anindya Chatterjee during trial this portion of the prosecution case has not been proved. However, this does not absolve the role of the appellant in the crime.

There are ample evidence on record appellant was the person who had booked the consignment wherein Charas was concealed. Whether he did so in connivance with M/s. Geeta Fashions remains unknown but such fact does not affect the culpability of the appellant.

Mr. Sengupta also argued chain of custody has not been proved as godown register was not produced and the persons who carried the samples for chemical examination were not examined. Evidence of the seizing officer (P.W. 2) as well as other witnesses including independent witnesses show samples from the contraband were sealed and kept in an envelope. Envelopes were signed by the appellant as well as witnesses who proved their signatures. Test memo and chemical report, Exbt.-18 and 18/1 show there is no tampering of the seals on the samples which were sent for examination. P.W. 2 has clarified the manner in which the samples were kept at the office of the Customs till they were dispatched for chemical examination. Test memos and chemical report proved the samples contained hasish.

In view of the aforesaid evidence on record, I am of the opinion non-production of godown register or examination of personnel who physically carried the samples to the chemical examiner's office in Kolkata does not break the live link in the prosecution case so as to render the test report otiose.

Finally, it is argued the seized articles have not been produced in court. P.W. 11, Judicial Magistrate deposed he examined the articles and thereafter certified the inventory list. Sub section (4) of Section 52A of the NDPS Act, inter alia, provides inventory of articles certified by Magistrate is primary evidence which may be adduced during trial. Inventory of the seized contraband duly certified by

Magistrate was adduced as primary evidence and marked as Exbts. – 19 and 19/1 during trial. It is contended representative samples had not been drawn during inventory and photographs had not been taken. From the evidence of the learned Magistrate, P.W. 11, I find there is due compliance of Section 52A of NDPS Act. Learned Magistrate deposed he examined the seized contraband and certified the inventory which was produced in Court as primary evidence in terms of Section 52A(4) of NDPS Act. Under such circumstances, non-production of the seized alamat has not affected the truthfulness of the prosecution case. Reference to ***Mohinder Singh vs. State of Punjab***[2] is inapposite. In the cited case there was neither compliance of Section 52A of NDPS Act nor was the seized contraband produced. As the prosecution evidence proves beyond doubt samples drawn from the contraband upon chemical examination tested positive to hasish and the inventory of the seized alamat certified by the Magistrate was produced as primary evidence, ratio in ***Mohinder Singh*** (supra) is factually distinguishable. On the other hand, reliance may be placed on ***State of Rajasthan Vs. Sahi Ram***[3]. In the said report the Apex Court held non-production of seized alamat by itself would not lead to acquittal particularly when the prosecution case is proved through reliable evidence.

In the light of the aforesaid discussion, I uphold the conviction and sentence of the appellant.

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[2] (2018) 18 SCC 540

[3] (2019) 10 SCC 649 (para 16 and 19)

The appeal is, accordingly, dismissed. In view of dismissal of the appeal, connected application being CRAN 2 of 2018 (*Old No. CRAN 3114 of 2018*) is also dismissed.

Period of detention suffered by the appellant during investigation, enquiry and trial shall be set off from the substantive sentence imposed upon him in terms of section 428 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 appellants upon completion of all formalities.

I agree.

(Ananya Bandyopadhyay, J.) **(Joymalya Bagchi, J.)**

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