
(2006) 12 PAT CK 0089
In the Patna High Court

Baidya Nath Singh @ Baijnath Singh

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 01-12-2006

Acts Referred:

Citation : (2006) 12 PAT CK 0089

Final Decision : Dismissed

Judgement

Jayanandan Singh, J.—Sole appellant has preferred this appeal against judgment and order dated 8.11.2004 by which he has been convicted under sections 20(b) (ii)(C) and 23(c) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as "NDPS Act") and sentenced under each count to undergo rigorous imprisonment for fourteen years and pay a fine of Rs. 1.25 lacs, in default, to undergo R.I. for eight months. Both the sentences were ordered to run concurrently and the period of jail spent by him has been ordered to be set off against the sentence.

2. Prosecution was set on motion on a written report given by one Ramesh Prasad, Customs Inspector, Motihari dated 29.1.2002. In the written report it was stated that a coded information was received at about 4.30 A.M. in the morning on 14.11.2002. On receiving the said information the raiding party led by the complainant proceeded to Bettiah side on Motihari-Bettiah road. They saw a truck bearing Registration No. BEA 7655 coining from Bettiah side which was signalled to stop. However, the truck did not stop and it speeded away. The raiding party led by the complainant chased the truck and after some distance was able to stop the truck. The driver of the truck was asked whether he was carrying Ganja and Charas to which he replied in affirmative and upon being asked the driver became ready to get the truck searched in presence of Gazetted Officers of the Customs Department. Thereafter, the truck was taken to Customs Office for checking and after performance of all formalities the truck was searched and 150 kg. of Nepali Ganja and 55 kg. of Nepali Charas were recovered from the truck which were seized and the driver was arrested and

remanded to judicial custody. Subsequently, charges were framed in the case and appellant was put on trial. Defence of the appellant is denial simplicitor. No evidence, either documentary or oral has been brought on record by him.

3. During trial, eight witnesses were examined by the prosecution. Out of the eight witnesses examined, P.W.1 is the Inspector of Customs. He was also a member of the raiding party. He supported the case that an information was received about Narcotic Drugs being carried in the truck and concealed in the hood of the truck and on information a team was formed, which proceeded to the Highway. He has further supported the case that the truck was signalled to stop but it did not stop. Thereafter, it was chased and intercepted. The truck was brought to the office of the Customs and in presence of two independent witnesses the truck was searched and Narcotic Drugs were seized.

4. P.W.2 is the Inspector of Customs and the complainant in the case. He fully supported the case of the prosecution in the complaint about information, chase and interception of the truck and ultimate search and seizure of the Narcotic Drugs from the truck. He further said that certain cash were also recovered from the possession of the appellant.

5. P.W.3 is the Superintendent of Customs in whose presence search and seizure were conducted. In his deposition he gave details of the search and seizure procedure, recovery of Narcotic Drugs, its seizure and the recovery of cash from the person of the appellant. He further deposed with regard to recording of confessional statement in his presence and the recording of interrogatory of the appellant in his presence by an independent witness Sanjay Pandey which was recorded on his dictates.

6. P.W.4 is the driver of the vehicle on which the raiding party had proceeded to the place of occurrence and had followed the truck and had intercepted it. He fully supported the prosecution case with regard to interception of the truck which was brought to the Customs Office for search and seizure of Narcotic Drugs.

7. P.Ws.5, 6 and 7 are the constables of Customs who were members of the raiding party. They also supported the prosecution case in all material particulars.

8. P.W. 8 is the godown incharge where Narcotic Drugs were kept and he got the inspection register exhibited to show that Narcotic Drugs were destroyed after performing due formalities.

9. On appreciation of evidence the trial court found the appellant guilty of the offence as charged and convicted and sentenced him accordingly, as stated above.

10. Learned Counsel for the appellant assailing the conviction and sentence of the appellant, has contended that two independent witnesses, namely, Sanjay Pandey and Birendra Sah, who were witnesses to seizure, panchnama, confessional statement and the interrogatory, were not examined by the

prosecution. Sanjay Pandey was the author of confessional statement and interrogatory. Therefore, the seizure , panchnama, confessional statement and interrogatory cannot be taken into consideration for the purposes of conviction and sentence of the appellant. Learned Counsel has further submitted that the seized articles did not belong to the appellant as in his confessional statement itself the appellant had disclosed that the seized articles belonged to one Jawahar who had loaded the same on his truck. Learned Counsel further contended that the recovery was not from conscious possession of the appellant and as such on these grounds the appellant was entitled to be acquitted of the charges. Referring to one sentence in the deposition of P.W.4, learned Counsel for the petitioner asserted that the seized Ganja and Charas were in fact planted by the officers of the Customs in the cabin of the truck.

11. In support of his first contention, learned Counsel relied upon judgments of the case of Stephen Seneviratne v. The King 1936 PC 289, Habeeb Mohammad Vs. The State of Hyderabad, Thulia Kali Vs. The State of Tamil Nadu, and S. Harnam Singh Vs. The State (Delhi Admn.), . With the support of these decisions, learned Counsel for the appellant submits that adverse inference has to be drawn on account of non-examination of two independent witnesses. On the question of conscious possession learned Counsel for the appellant referred to the judgment of the Supreme Court in the case of Madan Lal and Another Vs. State of Himachal Pradesh, and particularly paragraphs 19 to 26 and contended that appellant cannot be held to be in conscious possession of the contraband seized.

12. Learned Counsel appearing for the Union of India, however, disputed the assertions made by the learned Counsel for the appellant. Referring to the ordersheet of the court below, he pointed out that efforts were made to get the said two independent witnesses examined but the same failed as the appellant was in custody and on the application of the learned Counsel for the appellant evidence was closed. Relying on the judgment of Madan Lal (Supra) he further submitted that in cases of conscious possession presumption under sections 35 and 54 of the Act arises, which the appellant has failed to rebut.

13. I have considered the submissions made on behalf of the parties and have examined the case laws cited by the learned Counsel for the appellant. The two witnesses, Sanjay Pandey and Birendra Sah, were independent witnesses and were signatory to the seizure list, Panchnama, confessional statement and the interrogatory. In fact, Sanjay Pandey was the author of confessional statement and interrogatory which he recorded on the instructions of P.W.3. It is true that these two witnesses are important witnesses and their non-examination itself shall not be fatal to the case of the prosecution in case the prosecution brings evidence to rebut the inference. In my opinion, adverse inference to be drawn from non-examination of a witness is not always fatal to the case of the prosecution if on the basis of evidence on record prosecution is able to prove its case beyond all reasonable doubt.

14. Looking to the evidence of P.W.3, it appears that the seizure was made in his presence and list was prepared. Thereafter, he put questions to the appellant and the appellant answered to the same which was in his presence and as per his instructions the statements were recorded by Sanjay Pandey. P.W.3 has proved the interrogatory statements and has exhibited the same. P.W.3 happens to be a Gazetted Officer and under law he was competent to supervise the search, seizure and recording of statements which he did. Nothing is elicited from his cross-examination to disbelieve his statement with regard to preparation of the seizure list and recording of interrogatory and confessional statement of the appellant. As such, in my opinion, adverse inference arising from non-examination of independent witnesses does not prove to be fatal to the prosecution case. I have considered the evidence of other witnesses also and nothing in their cross-examination has come out to discredit the prosecution case and disbelieve the same. They have supported the prosecution case as made out in the complaint in all material particulars and are consistent in their evidence so far as chase of truck, its interception, bringing the same to the Customs Office, its search and seizure etc. are concerned.

15. The next submission of the learned Counsel for the appellant that the seized contraband did not belong to the appellant and he cannot be held guilty, has also no substance. The Custom Officials were not obliged to find out and establish the ownership of Narcotic Drugs. They were concerned with its possession and transportation with which the appellant was fully connected. The fact that Narcotic Drugs, namely, Ganja and Charas, were concealed in the hood of the truck which was otherwise empty and were being transported by the appellant and the truck was speeded away on being signalled by the raiding party to stop show his guilty mind. Knowledge of existence of Narcotic Drugs in his truck which itself is an offence under the N.D.P.S. Act.

16. In this regard, learned Counsel for the Union of India submitted that the conduct of the appellant becomes very material. The fact that the appellant did not stop on being signalled by the raiding party and speeded away from the place and was intercepted after chase itself shows the culpable mind of the appellant and his knowledge of Narcotic Drugs in his possession. The other submission of the learned Counsel for the appellant that the recovery was not from the conscious possession of the appellant also does not hold good as the conduct of the appellant clearly shows that he was conscious of the Narcotic Drugs existing in his possession in the truck. The fact that in his confessional statement he admitted carrying of Narcotic Drugs in his truck and disclosure of the name of the owner of the Narcotic Drugs by him shows that all through he had knowledge and was in the custody of Narcotic Drugs which he was carrying. His statement that he was paid Rs. 5,200/- as an advance for carrying Narcotic Drugs and its delivery also shows conscious possession of the same.

17. Learned Counsel for the Union of India drew the attention of the Court to Sections 35 and 54 of the N.D.P.S. Act, 1985. Section 35 of the Act reads as

follows:

35. Presumption of culpable mental state.- (1.) In any prosecution for an offence under this Act which requires a culpable mental state of the accused, the Court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect of the act charged as an offence in that prosecution.

Explanation.- In this section culpable mental state" includes intention, motive, knowledge of a fact and belief in, or reason to believe, a fact.

(2) For the purpose of this section, a fact is said to be proved only when the Court believes it to exist beyond a reasonable doubt and not merely when its existence is established by a preponderance of probability.

18. From a bare reading of Section 35 of the Act, it is apparent that the Court has to presume culpable mental state if the knowledge of a fact is established in the case. In the present case, knowledge of the appellant of existence of Narcotic Drugs in his truck stands fully established and beyond a reasonable doubt, as such as per the mandate of law it was appellant who had to establish satisfactorily and to rebut the presumption of the fact that he was not in a culpable mental state so as to be prosecuted and punished in the case.

19. Section 54 of the N.D.P.S. Act talks of presumption from possession of illicit articles. It reads as follows:

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 his Act in respect

(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.

20. Language of Section 54 clearly shows that once an accused is found in possession of Narcotic Drugs or Psychotropic Substance, it was incumbent upon him to account for the same satisfactorily, in absence of which commission of offence under the Act has to be presumed. In the present case, the existence of such huge quantity of Narcotic Drugs concealed in the hood of the truck is

established. The appellant has not satisfactorily explained its possession and has made a lame excuse that one Jawahar was the owner of the Narcotic Drugs and had handed him over for transportation. If the appellant wanted to escape from presumption of presence of culpable mental state and presumption under the provisions of the Act by possessing the Narcotic Drugs, it was incumbent upon him under the law to satisfactorily explain his position and absence of any culpable mental state for carrying the same. In the present case, the appellant has completely failed to rebut this presumption. On the other hand, articles concealed in the hood of the truck, his act of speeding away on being asked, to stop and being intercepted much after chase completely establish his culpable mental state and as such the presumption of offence under the Act committed by him arising out of Section 54 of the Act stands fully established.

21. Before parting with the case, I may refer to the submissions of the learned Counsel for the appellant made with reference to one sentence of the deposition of P.W.4. The sentence read in isolation may create confusion and may give an impression that the officer had planted Ganja and Charas on the truck. However, when the evidence of this witness is read as a whole and along with his statement in the cross-examination, it is clear that the said sentence has not been correctly written in the deposition and as such is just an error in recording his statement made in court and nothing material can be extracted from the same.

22. After having examined the evidence and considering the rival submissions and the materials on record, I come to the conclusion that the prosecution has fully established its charges against the appellant and the defence has failed to point out any material discrepancy in the prosecution case so as to lead this Court to disbelieve the same. Accordingly, the conviction of the appellant is upheld.

23. On the question of sentence, I find that the appellant is of advance age and at the time of judgment of the trial court he was 68 years old and he was driver of the truck, obviously having not substantial base. As such, while dismissing the appeal I modify his sentence to the minimum limit prescribed i.e. ten years R.I. and a fine of rupees one lac only, in default of which he will have to remain in custody for another six months.

24. In the result, this appeal fails and is accordingly dismissed with the aforesaid modification in sentence.