
(2013) 04 DEL CK 0399

In the Delhi High Court

Case No : Criminal A. 391 of 2011 and Criminal M.A. No. 4401 of 2012

Bajnath and Others

APPELLANT

Vs

State

RESPONDENT

Date of Decision : 10-04-2013

Acts Referred:

Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 2(iii)(b), 20, 42, 50, 52

Citation : (2013) 2 JCC 71

Hon'ble Judges : Mukta Gupta, J

Bench : Single Bench

Advocate : Naveen Gaur, for the Appellant; Manoj Ohri, APP for the State, for the Respondent

Final Decision : Dismissed

Judgement

Mukta Gupta, J.—By the present appeal the Appellants impugn the judgment dated 13th January, 2011 whereby the Appellants have been convicted for offence punishable u/s 20 NDPS Act and the order on sentence dated 24th January, 2011 whereby they have been directed to undergo 10 years rigorous imprisonment with fine of Rs. 1 lakh and in default of payment of fine to undergo six months rigorous imprisonment. Learned counsel for the Appellant contends that in the alleged contraband only leaves and twigs were found, thus the same does not fall within the definition of Ganja as defined u/s 2(iii)(b) of the NDPS Act. There is violation of mandatory provisions of Section 42 and 50 NDPS Act as no information was given to the senior officers by the searching officer. Further the searching officer started searching the Appellants without obtaining authorization from senior officers. Though Section 50 of the NDPS Act was not attracted, however still notice was given and the notice does not bear signatures of the Appellants. Their signatures were taken only on the refusal. As per the seizure memos, the recovered articles contained patti and danthal-numa Ganja. The samples were sent belatedly for examination to the FSL after 35 days. The seals continued to be in the possession of the SHO and the IO and thus

tampering with the case property cannot be ruled out. Despite 4 samples were taken only 1 form FSL was filled up. There is contradiction in the testimony of the witnesses to this extent as well. The searching officer PW9 states that only 1 form FSL was filled whereas other witnesses of the raiding team PW5 and PW7 state that 4 form FSL were filled. Though 2 kgs of samples were taken from each contraband, however the samples when weighed at the laboratory weighed more. Hence tampering with the samples is apparent. Further from Appellants Baijnath and Rajesh only intermediate quantities of contraband were recovered hence the Appellants be acquitted of the charge framed and in the alternative their sentence should be reduced to the period already undergone. Reliance is placed on Mohd. Ibrahim Vs. State of NCT of Delhi Crl. A. No. 426/2010 decided on 27th November, 2010 by this Court.

2. Learned APP on the other hand contends that the report of PW10, the FSL expert is clear and it is stated that the contrabands were recovered with flowering and fruiting tops. The Moharar malkhana has clearly stated that as long as the samples remained in his custody, they were not tampered with and thus in view of State of Punjab Vs. Lakhwinder Singh and Another, no benefit can be granted to the Appellants on this ground. The contention of the learned counsel for the Appellant with regard to the difference in the weight of the sample has been dealt with by the learned Trial Court and it has been held that much importance cannot be laid on these small variations. Further the seal after use was handed over to Constable Suresh at the spot and thereafter the case property was sent to the Police station where PW4 Inspector Gurmeet Singh also affixed his own seal and deposited the case property and the samples in malkhana. Under these circumstances SI K.P. Singh had no access to the case property and even if he received the seal back on the same day, the same does not make any difference. Ex. PW1/5 shows that intimation was given to the senior officers. Sections 52 and 57 NDPS Act were duly complied with. As regards compliance of Section 42 of NDPS Act is concerned, the search of the Appellants took place in public place in broad day light at 10.30 AM and thus Section 42 NDPS Act was not applicable. Reliance is placed on Karnail Singh Vs. State of Haryana, Bahadur Singh Vs. State of Haryana, As regards non-association of public witness, reliance is placed on State of Haryana Vs. Mai Ram, and P.P. Beeran Vs. State of Kerala,

3. I have heard learned counsel for the parties. Briefly the prosecution case is that on 11th June, 2007 when SI K.P. Singh was on patrolling duty along with Constable Suresh and Constable Sunil at 10.30 AM, they found three persons wearing Army colour jackets and caps, getting down from a bus with trunks in their hands and one of them was also having a green colour bag. On becoming suspicious, the Police party asked them to show their identity card, however they could not show the same. On further enquiries they disclosed that they had Ganja in their trunks and bags and thus they were apprehended. From the possession of Appellant Baijnath Mehto 20 Kgs Ganja, from the Appellant Rajesh Kumar 20 Kgs Ganja and from Appellant Birju Chhetri 30 Kgs Ganja was

recovered i.e. 20 Kgs from the trunk 10 Kgs from the bag was recovered. As regards non-compliance of Section 42 NDPS Act, the recovery of the articles is from a public place and in broad day light and hence Section 42 of the NDPS Act is not attracted.

4. According to the prosecution 2 Kgs of samples were taken from each of the case property, however when the same were weighed at the FSL they were found to be 2.3 Kgs, 2.6 Kgs, 2.1 Kgs and 2.1 Kgs. Undue importance cannot be laid to this difference in the weight because at the spot, the samples were weighed with a normal scale whereas in the FSL lab the same were weighed with electronic weights and thus some difference is bound to take place.

5. Section 50 of the NDPS Act was not required to be complied with in the present case as firstly it was a case of chance recovery and secondly the recovery was not made from the personal search of the Appellants. The recoveries were from the trunks and bags in their possession. Thus the contention of the learned counsel for the Appellant that notice u/s 50 NDPS Act do not bear their signature and only signature were taken on the refusal is meaningless. Further the notice and the refusal is on the same page and hence signatures not being taken separately would not lead to an inference that there is non-compliance of mandatory provision.

6. Learned counsel for the Appellant has strenuously argued that as per the seizure memo Ex. PW5/A, PW5/B and Ex. PW5/C Patti and danthal-numa Ganja has been recovered, thus the recovery was of leaves and stems and not charas. I find no force in the argument of the learned counsel for the Appellant. Section 2(iii)(b) defines "Ganja" as the flowering or fruiting tops of the Cannabis plant (excluding the seeds and leaves when not accompanied by the tops), by whatever name they may be known or designated. As per the report of FSL Ex. PW1/L samples SA, SB, SC, ST were dried vegetative material along with seeds and twigs and were identified as dried Indian hemp. Thus the leaves and twigs were not devoid of the flowering and fruiting top. Further the other report of FSL PW1/K which was given on chromatographic examination showed that SA, SB, SC and ST were found to contain Tetrahydrocannabinol which is the main constituent of Cannabis plant. Thus, the recovery being of Ganja has been proved by the prosecution beyond reasonable doubt.

7. Coming to the next contention of the learned counsel for the Appellants that only 1 form FSL was filled, it may be noted that there is no requirement in law that for number of parcels recovered during the course of the same transaction separate FSL forms are required to be filled. Since the case properties and the samples were sealed by the seals of KPS, 1 common FSL form with sample seals could have been sent.

8. As per register No. 19 there is variation in the seals as the samples pertaining to Bajinath Mehto were sealed with seal of KPS only, the others with both KPS and GSP. The seals on the case properties and the samples were as under:

9. Though a perusal of the charge-sheet shows that the case property and sample recovered from Appellant Baijnath were not sealed with the seal of GSP i.e. SHO, however this appears to be an inadvertent error in view of the testimony of the witnesses. PW4 Inspector Gurmeet Singh the then SHO PS Punjabi Bagi stated that he sealed all the case properties and the samples with his seal. That he appended his seal of GSP on all the 8 pullandas and FSL form and deposited the case property and FSL memo through seizure memo in the malkhana of the Police Station and lodged DD No. 20A in this regard. Further it is not disputed that the form FSL had both the seals. As per the FSL report Ex. PW1/L the seals on all the 4 sealed clothes parcels were found intact as per F.A.'s letter. In case one of the samples was not sealed with the seal of SHO PW4, the same would not be found tallying with the form FSL. PW7 Ranjit Kumar MHCM on 16th July, 2007 has stated that on that date he sent 4 pullandas and FSL forms having seals of KPS and GSP on all the pullandas and FSL form through Constable Suresh Kumar vide R.C. No. 107/21. This witness has not been confronted with the entry in the registry No. 19 to show that his version was incorrect. Further PW6 HC Mahender who was working as MHCM on 11th June, 2007 also stated that he was handed over three sealed trunks and one sealed canvas bag and 4 samples pullandas sealed with the KPS and GSP along with three copies of seizure memo in the FSL form. Even this witness has not been cross-examined on this aspect. In State of Uttar Pradesh Vs. Nahar Singh (Dead) and Others, it was held:

14. The oft-quoted observation of Lord Herschell, L.C. in *Browne v. Dunn* [(1893) 6 R 67] clearly elucidates the principle underlying those provisions. It reads thus:

I cannot help saying, that it seems to me to be absolutely essential to the proper conduct of a cause, where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact by some questions put in cross-examination showing that that imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged, and then, when it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which, it is suggested, indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit. My Lords, I have always understood that if you intend to impeach a witness, you are bound, whilst he is in the box, to give an opportunity of making any explanation which is open to him; and, as it seems to me, that is not only a rule of professional practice in the conduct of a case, but it is essential to fair play and fair dealing with witnesses.

This aspect was unfortunately missed by the High Court when it came to the conclusion that explanation for the delay is not at all convincing. This reason is, therefore, far from convincing.

Since none of the witnesses have been confronted with this document, the same cannot be used to discredit their testimony. No doubt, Section 55 of the NDPS

Act is required to be complied with, however, the compliance has to be tested in each case depends on its facts. In the present case the fact that the seal of the SHO was affixed is evident from the report of the FSL which states that the specimen seals were found intact. In view of the aforesaid discussion, I find no illegality in the impugned judgment convicting and sentencing the Appellants as aforesaid. Appeal and application are accordingly dismissed.