

(2009) 04 DEL CK 0621

In the Delhi High Court

Case No : Criminal A. No. 12 of 2009 and Criminal M. (B) No. 23 of 2009

Bal Bahadur

APPELLANT

Vs

Customs Air Customs Officer IGI Airport

RESPONDENT

Date of Decision : 08-04-2009

Acts Referred:

Constitution of India, 1950 — Article 14, 19, 21
Criminal Procedure Code, 1973 (CrPC) — Section 313
Customs Act, 1962 — Section 67
Evidence Act, 1872 — Section 24, 25, 26, 27
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 21, 23, 28, 50, 67
Penal Code, 1860 (IPC) — Section 302

Citation : (2009) 04 DEL CK 0621

Hon'ble Judges : Dr. S. Muralidhar, J

Bench : Single Bench

Advocate : Bharat Bhushan and R.S. Bhorla, for the Appellant; Satish Aggarwal, Shirish Aggarwal and Sushil Kaushik, for the Respondent

Final Decision : Dismissed

Judgement

S. Muralidhar, J.—This appeal is directed against the judgment dated 27th August 2008, passed by the learned Special Judge, NDPS, New Delhi in SC No. 75/04 holding the appellant guilty of committing offences punishable u/s 21(c) as well as Section 23(c) read with Section 28 of the Narcotic Drugs & Psychotropic Substances Act, 1985 (NDPS Act). It is also directed against the order dated 29th August 2008, passed by the learned Special Judge, NDPS sentencing the appellant to undergo rigorous imprisonment (RI) for 10 years with fine of Rs. 1 lakh and in default of payment of fine imprisonment for a further period of one year for the offence u/s 21(c) NDPS Act and an identical sentence for the offence u/s 23(c) read with Section 28 NDPS Act. Both sentences were directed to run concurrently. Case of the prosecution.

2. The case of the prosecution is that on 28th January 2000 the appellant, a

Nepalese passport holder, was asked by the Customs Officer in the departure area of the IGI Airport, New Delhi where he was waiting after immigration check up to board a flight to Bangkok, whether he was carrying any narcotic drugs or other contraband. When he replied in the negative, the appellant was escorted to the departure hall where two witnesses were called. These were PW-5 Lachman and one Satish Kumar. The appellant was served a notice u/s 50 NDPS Act informing him in vernacular that his search could be conducted in the presence of either a Magistrate or a Gazetted Officer of the Customs. His search was conducted but nothing incriminating was found. However, since appellant was looking uneasy he was subjected to a sustained enquiry. He then admitted to have concealed capsules filled with heroin inside his stomach. He volunteered to eject them but stated that he could not do so without medical aid.

3. The appellant was arrested in the intervening night of 28th and 29th January, 2000. A panchanama was prepared of the seizure of the appellant's air ticket and boarding pass. The appellant made a statement on 29.1.2000 u/s 67 NDPS Act stating that he had come to Delhi on 14.1.2000 from Nepal and stayed at a hotel in Majnu Ka Teela, Delhi where a foreigner met him and offered to pay him 500 US dollar for carrying capsules filled with heroin to Bangkok. The said person visited him on the evening of 28.1.2000 and delivered 80 capsules filled with heroin along with a Thai Airways ticket. On 29th January 2000 the appellant informed the Customs Officials that he was ready to eject the capsules. In the toilet he ejected 48 cylindrical capsules wrapped with white colour plastic surface of similar size in the presence of witnesses as well as Shri B.C. Gogna, Air Custom Officer (who was examined as PW-1). A pinch of powder was taken from each of the 48 recovered capsules. When tested with the field drug test kit it gave a positive result for the presence of heroin.

4. Since the appellant admitted that he had more heroin filled capsules in his abdomen and required medical help, he was produced before the Additional Chief Metropolitan Magistrate who ordered his admission to the Ram Manohar Lohia Hospital (RML Hospital). The appellant remained in RML Hospital till 4th February 2000. During this period, he evacuated 51 more capsules which were again sealed in four different packets. He was discharged on 4th February 2000, brought to the IGI Airport where in the presence of two witnesses he was shown the four sealed packets and the witnesses signed them certifying that they were not tampered. The four packets were cut, opened and examined, counted and tallied with the details in the recovery memos. The capsules were opened and a pinch of the substance from each capsule tested positive for heroin.

5. The case of the prosecution is that the heroin recovered from the 48 capsules ejected by the appellant in the Airport on 29th January 2000 weighed 437 grams. The heroin recovered from the 51 capsules ejected in the RML Hospital between 29th January 2000 and 4th February 2000 weighed 458 grams. These were therefore commercial quantity in terms of Section 21(c) NDPS Act. The samples sent to the Central Revenue Control Laboratory (CRCL) were tested and

found to contain Diacetylmorphine (DAM) of percentage 76.16 (vide report dated 10th March 2000) and 72.24% (vide report dated 24th March 2000).

6. On 4th May 2000, Shri B.C. Gogna (PW 1) filed a complaint under Sections 21, 23 and 28 NDPS Act in the Special Court for NDPS cases, Delhi. Thereafter 15 prosecution witnesses (PWs) out of the 24 listed were examined by the complainant (the Respondent herein) and the prosecution evidence was closed. The trial ultimately concluded after eight years and the impugned judgment and order as noted in para 1 were passed by the learned Special judge.

7. The present appeal was sent by the appellant from the jail and listed on 19th January 2009. Mr. Bharat Bhushan, learned Counsel on the panel of the Delhi Legal Services Authority (DLSA) appeared for the appellant. Since as on 29th January 2009, the appellant had completed 8 years, 11 months and 25 days of the sentence, the hearing of the appeal was expedited. Effect of public witness to the recovery turning hostile.

8. It is first submitted that the case itself was a planted one as no public witness was able to support the case of the prosecution. The case hinged on the recoveries of the capsules containing heroin from the appellant. The sole public witness Lachman Dass PW-5 turned hostile and refused to support the prosecution. Reliance is place on the judgment of the Supreme Court in Narcotics Control Bureau, Mumbai v. Abdullah Hussain Juma and Anr. 2003 (2) C.C. Cases (SC) 155. Also the Doctor (PW 15) in whose presence the capsules were recovered at the RML Hospital did not support the case of the prosecution. Reliance is also placed on the judgment of this Court in Prithvi Pal Singh @ Munna v. State 2000 (2) C.C. Cases HC 174 in this regard.

9. This Court has considered the said submission. The evidence of PW-5 Lachman indeed did not support the prosecution. PW-5 nevertheless states that he and Satish Chander were called in the departure hall of IGI Airport; that the officers asked the appellant whether he was carrying any contraband to which he replied in negative. PW 5 also confirms that the officers served notice u/s 50 on the appellant. He states that on search of the bag of the accused nothing incriminating was found. Therefore, these facts in fact stand corroborated. What the witness denied was that the accused had admitted to concealing capsules in his body and that he offered to eject them with medical aid. The record shows that the prosecution dropped the other public witnesses Om Kumar and Satish Kumar since they could not be served with summons for several dates.

10. There may be practical problems faced by the Customs officials in getting independent witnesses for the searches and recoveries made at the international airport, particularly when passengers are waiting to board flights. Still, if the prosecution has named an independent witness it will have to take the consequence of his subsequently turning hostile. However, in the instant case the proof of the recoveries made does not hinge on the evidence of PW 5 alone. The case of the prosecution stands fortified by the detailed evidence of PW-1 Shri

Gogna. The criticism that he is not an independent witness is to no avail since this witness was not cross-examined by counsel for the appellant. The case record shows that despite several opportunities being given over an extended period of nearly three years, counsel for the appellant did not cross examine PW 1 Shri Gogna for one or the other reason. The opportunity to do so was closed by the trial court on 8th March 2004. Having perused the orders passed by the Special Court from time to time, this Court finds that the trial court cannot be held to have acted unfairly in doing so. Also, no request was made to the trial court for recalling PW 1 thereafter. The facts in Abdullah Hussain Juma and Prithvi Pal Singh (supra) reveal that those decisions are distinguishable in their application to the present case. The case of the prosecution hinges on the evidence of PW 1 which has remained un-rebutted.

11. What is also against the appellant is the confessional statements made by him to the Custom Officials u/s 67 of the Customs Act, 1962. It was sought to be urged that the statements were dictated by the Custom Officials themselves since the appellant could not have possibly known Hindi. Learned SPP has pointed out that the accused although a Nepali did know Hindi and in fact the statements were written out by him in Hindi. On a perusal of the record, this submission of the learned APP appears to be correct.

12. The law on this aspect is also against the appellant. In *Kanhaiyalal v. Union of India* 2008 (1) JCC 23, the Supreme Court has held that the statement made u/s 67 can be used as a confession against the person making it and is not affected by Sections 24 - 27 of the Evidence Act. This has been followed by this Court in *Rehmatullah v. Narcotics Control Bureau* 2008 (3) JCC 174. Other evidence

13. In light of the above evidence, the criticism of the learned Counsel for the appellant of the evidence of PW-15 (Dr. S.K. Sharma, Head of the Department (Emergency) R.M.L. Hospital) that it does not support the case of the prosecution loses force. While it is correct that Dr. Sharma has stated that he had no personal knowledge as to what happened during the period 29th to 4th February 2000, the case record contains several documents of the OPD record of RML Hospital which show that the accused ejected different quantities of capsules on different dates. All these documents have been proved by PW-1 B.C. Gogna. Exhibit PW-1/Q2 shows that the accused on 13th January initially ejected 16 capsules and later a further 5 capsules. On 31 January 2000 he initially ejected one capsule and later on that date he ejected a further 29 capsules. These slips have been signed by different Doctors of the RML Hospital. The discharge summary issued by the RML Hospital also confirms that the accused ejected 51 capsules. All these documents were contemporaneously recorded. They fully establish the case of the prosecution beyond reasonable doubt.

14. It was sought to be contended that the purity percentage was not indicated in the report of the CRCL. However, the CRCL reports marked as PW-1/U-1 and PW-1/V-2 indicate the purity percentage. Further, in para 25 of the impugned

judgment the learned ASJ adverts to this fact. It is clear, therefore, what the accused was carrying was in fact a commercial quantity of heroin.

15. Having examined the entire record as well as the impugned judgment of the learned ASJ this Court finds no reason to differ from the reasoning or the conclusion arrived at by the learned ASJ. The prosecution has indeed been able to prove beyond reasonable doubt that the accused was carrying a fairly large quantity of heroin in his body when he was apprehended at the IGI Airport waiting to board a flight to Bangkok. The conviction of the petitioner for the offences aforementioned is accordingly upheld. The right to representation at expense of state by competent counsel.

16. Before concluding, this Court would like to reflect on the aspect of the right of the accused to representation by a competent counsel at state expense at the trial. The case record shows that the accused was initially represented by a counsel engaged on his own. Shri Gogna, PW-1, was examined in chief from 9th October 2000 onwards. This appears to have continued for a long time. Meanwhile, PW-2 was also examined in part. The counsel for the accused wanted to however first examine the two recovery witnesses and, therefore, the case kept getting adjourned to secure their presence. One of them Lachman was present on 29th April 2003 but the other witness Satish Kumar was not present and so the case was again adjourned. On 2nd December 2003 PW-1 was present but again the counsel for the accused sought an adjournment. The learned ASJ expressed his displeasure and observed that no further opportunity would be given. On 8th March 2004 Shri Gogna was again present but the defence counsel did not turn up despite the court waiting till 3 pm. The record of the case shows that several opportunities were given to the accused to cross-examine PW-1 but his counsel declined for one reason or the other.

17. The case was thereafter listed for further prosecution evidence on 26th April 2004. The record shows that on 15th April 2004, the accused was produced from judicial custody and filed an application for being represented by a lawyer at State expense. The Special Judge appointed Shri Abhimanyu Kumar, who was present in the Court, as Amicus Curiae. Meanwhile, the other PWs were examined but sporadically amidst several adjournments. At one stage, on 11th August 2008, the learned Special Judge noticed that till that date only 15 of the 24 prosecution witnesses had been examined. On the previous date i.e. 5th August 2008, the prosecution had been given a last opportunity to lead its evidence. However, no witness was present on 11th August 2008. Consequently, the prosecution evidence was closed and the case adjourned to 18th August 2008 for recording the statement of the accused u/s 313 CrPC. On 19th August 2008, the statement of the accused was recorded and on his request Shri T.K. Mahapatra was appointed as Amicus Curiae. On 21st August, 2008 after noting that no defence evidence was being led it was closed, another advocate was appointed as Amicus Curiae.

18. This Court has adverted to the aforementioned proceedings in some detail

because one of the grievances made by Mr. Bharat Bhushan, learned Counsel for the appellant who is himself a counsel on behalf of the DLSA is that the appellant did not receive the assistance of competent counsel in the trial court. The above proceedings bear out this submission. The counsel who initially represented the appellant between 20th March 2001 and 15th April 2004 failed to cross-examine PW-1. The first time an Amicus Curiae was appointed was on 15th April 2004. Thereafter, at least on three occasions Amicus Curiae were changed. However, none of them appears to have sought the recall of PW-1 for cross-examination. This is indeed unfortunate as the lynch pin of the prosecution evidence in the form of the evidence of PW-1 remained un rebutted.

19. The Supreme Court has had occasion to comment on the quality of legal aid counsel appointed to defend accused in cases involving grave offences punishable with severe sentences. In *Kishore Chand Vs. State of Himachal Pradesh*, it was observed (SCC, p.297):

Before parting with the case, it is necessary to state that from the facts and circumstances of this case it would appear that the investigating officer has taken the appellant, a peon, the driver and the cleaner for a ride and trampled upon their fundamental personal liberty and lugged them in the capital offence punishable u/s 302, IPC by freely fabricating evidence against the innocent. Undoubtedly, heinous crimes are committed under great secrecy and that investigation of a crime is a difficult and tedious task. At the same time the liberty of a citizen is a precious one guaranteed by Article 3 of Universal Declaration of Human Rights and also Article 21 of the Constitution of India and its deprivation shall be only in accordance with law. The accused has the fundamental right to defend himself under Article 10 of Universal Declaration of Human Rights. The right to defence includes right to effective and meaningful defence at the trial. The poor accused cannot defend effectively and adequately. Assigning an experienced defence counsel to an indigent accused is a facet of fair procedure and an inbuilt right to liberty and life envisaged under Articles 14, 19 and 21 of the Constitution. ...

13. Though Article 39-A of the Constitution provides fundamental rights to equal justice and free legal aid and though the State provides amicus curiae to defend the indigent accused, he would be meted out with unequal defence if, as is common knowledge the youngster from the bar who has either a little experience or no experience is assigned to defend him. It is high time that senior counsel practising in the court concerned, volunteer to defend such indigent accused as a part of their professional duty. If these remedial steps are taken and an honest and objective investigation is done, it will enhance a sense of confidence of the public in the investigating agency.

20. It is plain that in cases involving serious offences attracting severe penalties, the purpose of providing a fundamental right to free legal aid would be defeated if competent counsel are not assigned to defend the accused. In the instant case, the accused is a Nepali national, who was possibly unable, because of his

poverty, to engage a competent lawyer and also unable to instruct the lawyer assigned to him. It is possible that the lawyer requested to assist the trial court as amicus curiae met him only when he was produced in Court at the hearing and not in the jail.

21. This Court would suggest to the DLSA that it should prepare a separate panel of trial court lawyers comprising senior lawyers of not less than 10 years or more experience and associate lawyers of not less than five years" to defend the indigent accused facing trial for commission of offences punishable with sentence of seven years and more. Care may be taken to ensure their competence in handling serious cases. It is desirable that a team of two lawyers- one having more than 10 years" standing and the other having more than 5 years" experience- be assigned to each such accused in the trial court who has to defend himself in a case involving a severe sentence. A special set of fees may also be paid to such lawyers so that they can give of their best. This is essential if the promise of providing free legal aid to indigent accused should be a meaningful one. The constitutional requirement, as enshrined in Article 21, of ensuring a fair trial in accordance with the procedure established by law requires that every accused facing trial for a grave offence is represented by competent legal aid counsel.

22. As far as the present case is concerned, for the detailed reasons discussed hereinbefore this Court is satisfied that the absence of competent counsel to defend the appellant did not make a difference to the ultimate result since there is overwhelming evidence to prove the case of the prosecution beyond reasonable doubt. Also in this Court, the appellant was ably defended by the lawyer on the panel of the DLSA. Sentence and fine

23. The appellant has been awarded the minimum sentence of 10 years. However, learned Counsel for the appellant made an earnest plea that the default sentence should be reduced considering the poverty of the appellant. It is pointed out that in several cases the default sentence had been to the extent of one month only. This plea of the learned Counsel for the appellant appears to be justified. Accordingly, the impugned order dated 29th August 2008 sentencing the appellant to 10 years" RI and fine of Rs. 1 lakh and in default a further RI for one year is modified only to the extent that in default of payment of fine of Rs. 1 lakh appellant will undergo one month"s RI. This modification will apply to the sentences both for the offences u/s 21(c) NDPS Act as well as Section 23(c) read with Section 28 NDPS Act both of which have been directed to run concurrently.

24. Subject to the modification in the default sentence as directed in para 23, the appeal is dismissed. The bail application is also dismissed.

25. The Court records its appreciation of the excellent assistance provided by Mr. Bharat Bushan, appearing for the appellant as a lawyer on the panel of the DLSA.

26. A certified copy of this order be delivered to the Secretary, DLSA as well as to the appellant through the Superintendent, Central Jail, Tihar forthwith.