
(2001) 09 PAT CK 0078
In the Patna High Court
Case No : Criminal Appeal No. 427 of 2000

Dayanand Bharati

APPELLANT

Vs

The Union of India (UOI)

RESPONDENT

Date of Decision : 28-09-2001

Acts Referred:

Citation : (2001) 09 PAT CK 0078

Final Decision : Allowed

Judgement

I.P. Singh, J.—The sole Appellant has been convicted u/s 20(b)(i) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (in short "the Act") and has been sentenced to undergo rigorous imprisonment for 5 years with a fine of Rs. 10,000/-. In default he will have to undergo rigorous imprisonment for two months.

2. The prosecution case, in brief, is that one Atma Kumar, Inspector, Customs, Purnea filed a complaint in the Court of the District and Sessions Judge-cum-Special Court, Purnea disclosing therein that on 24.6.1998 at 6 A.M., a casual information was received by Superintendent, Custom(P), Purnea regarding transporting of Ganja from Assam by a truck bearing registration No. AS-01A/3931 passing through N.H. 31 proceeding to Buxar via Purnea. The Superintendent, Custom (P), Purnea contacted the Assistant Commissioner (P), Forbesganj on phone immediately and informed him about the entire fact and thereafter the Assistant Commissioner Custom (P) Forbesganj constituted a preventive party under the leadership of Sri. P.M. Srivastava, Superintendent, Custom (P), Purnea to intercept the said truck. The preventive party left Purnea office at 8 A.M. on the same day for interception of the said truck and for that purpose they started road patrolling on N.H. 31 in between Baisi to Gerabari. Further it is alleged that at about 10 P.M. on the same day when the patrolling preventive party was coming back from Gerabari side, they located the said truck No. AS-01 A/3931 coming from Purnea side and on seeing the truck patrolling party gave a signal to stop but the truck driver avoiding the signal proceeded

ahead with high speed and then preventive party after chasing the said truck for about 2 K.M. could intercept and stopped the said truck near Bangarha. The preventive party gave their identification to the driver of the truck and also explained their purpose to stop the truck and on inquiry, the driver of the truck disclosed his name to be accused Dayanand Bharti. Khalasi of the truck slipped away taking advantage of the darkness but his name was disclosed by the driver of the truck. The preventive party told the driver that they got information that the truck is carrying Ganja but the driver denied and then preventive party expressed their desire to search the truck and for that purpose, they also gave option to the driver to get the truck searched in presence of the Magistrate if he so likes to which driver gave his reply in negative. In the meantime some persons assembled there and then preventive party officers in presence of the independent witnesses after observing all the legal formalities, made search of the truck which was loaded with oil cakes. On search, from the truck, 5 quintals of Ganja in plastic packets kept under the oil cakes bags were recovered and a seizure list was prepared in presence of two local witnesses. The recovered Ganja on weighment was found about 5 quintals of the value of Rs. 25,00,000/-. A panchnama was also prepared in presence of independent witnesses and the driver of the truck signed over the seizure list and the Panchnama. Samples were also taken from the seized Ganja in presence of the witnesses for test. Further it has been alleged that the driver of the truck made his voluntary confessional statement in presence of two local witnesses and the driver stated that Arbind Singh got lodged Ganja in the truck and promised to pay a sum of Rs. 40,000/- as freight and the said Arbind Singh is habitual smuggler of Ganja from Assam to Bihar. The driver was also interrogated by Superintendent of Custom(P), Purnea and he was arrested and forwarded to the Special Court alongwith all relevant papers. The entire facts were reported to the concerned authority for proper action and instruction and on receiving the instruction from concerned authority, a complaint was filed on the basis of which cognizance was taken and subsequently the trial concluded with the result as stated above.

3. The Appellant pleaded not guilty and has stated that he has been falsely implicated in this case.

4. The prosecution in support of its case has examined altogether 7 witnesses. P.W. 1 is P.M. Srivastava. P.W. 2 is Binay Kumar Jha, P.W. 3 is Jagdish Kumar Pandit, P.W. 4, Atma Kumar the complainant. P.W. 5 is Mahesh Lal, P.W. 6 is Ratan Paswan, P.W. 7 is Fakira Paswan.

5. P.W. 4, Atma Kumar, Inspector, Custom(P) is the complainant of the case. He has stated that on 24.6.1998 Shri P.M. Srivastava, Superintendent of Custom got an informant that a truck bearing No. AS-01 A/3931 was carrying Ganja and it was proceeding to Buxar via Purnea on N.H. 31. He has further stated that this information was given to the Assistant Commissioner, Custom and thereafter a preventive party was constituted to intercept the said truck. He has further stated that while he alongwith other members of the preventive party were

patrolling on N.H. 31 at about 10 P.M. he saw the truck coming from Purnea side while preventive party was returning from Gerabari to Purnea and then signal was given to the truck driver to stop the truck but the truck driver started to proceed ahead with high speed and then after chasing near Basgarha, preventive party stopped the truck and in presence of two witnesses, on search from the truck, 5 quintals of Ganja were recovered and the same had been concealed under oil cakes bags. He has further stated that he gave option to the truck driver to get search of the truck in presence of Magistrate but the truck driver became ready to get the truck searched without Magistrate and then his truck was searched in presence of two independent witnesses and on search 5 quintals of Ganja had been recovered from the truck and a seizure list were prepared in presence of two local witnesses. He has further stated that the valuation of the seized Ganja comes to Rs. 25,00,000/-. A panchnama was also prepare which has been marked as Ext. 2. He has further stated that the truck driver made his confessional statement in presence of two independent witnesses which has been marked as Ext. 3.

6. The other witnesses P.Ws. 1, 2, 3, 5, 6 and 7 have also supported the case. They have stated that in their presence the truck of the Appellant was searched by the custom officials and on search 5 quintals of Ganja have been recovered from the truck and the said Ganja was kept in plastic bags under oil cakes bags. They all were the members of the preventive party.

7. Learned Counsel appearing on behalf of the Appellant has submitted that the search and seizure made by the Inspector (Custom) who was not authorised to make search under the provisions of Section 42 of the Act which is mandatory and it has been laid down that a search and seizure can only be done by an officer duly authorised by the Central or State Government. In this regard he has placed reliance on number of decisions; State of Punjab Vs. Balbir Singh, In the aforesaid decisions it was held that Section 42 of the Act is mandatory provision and only those officers who have already been authorised by the Government can search and seize. However, in this regard the counsel appearing on behalf of the Central Government did not show any notification issued by the Government of India authorising the Officer of Department of Custom u/s 42 of the Act.

8. The other contention of the learned Counsel for the Appellant is that the mandatory provision of Section 55 of the Act had also not been complied with. In this regard he has relied upon a decision reported in Thandi Ram Vs. State of Haryana, in which the High Court has convicted the Appellant observing that even though the provisions of Section 55 of the Act may be mandatory but no prejudice having been caused the conviction does not get vitiated. However, the Apex Court has held that if provisions of Sections 55 and 57 have not been complied with the conviction was bad in law and also it was held that since the Appellant has remained in jail for 9 years the Apex Court set aside the judgment of the High Court and acquitted the Appellant.

9. In this case learned Counsel appearing on behalf of the Central Government

has pointed out that the Custom Department intercepted the Appellant by a raiding party headed by Superintendent of Custom and other Officers of the rank of the Inspector etc. They have searched and seized the narcotic substance as Ganja 5 quintals and seizure list was prepared by the Inspector who was the member of the raiding party. It has also been pointed out that the Appellant himself has accepted his guilt during the interrogation made by the Inspector Custom and has also given his confessional statement before the preventive party, as such even though mandatory provisions of section of the Act has not been complied with the case of recovery of Ganja itself proved by the confessional statement given by the Appellant which has been supported by the witnesses before whom the confession was made. It is well settled that any confession made before the police is not admissible under the Evidence Act. The Custom Officers are not Police Officers and confession made before them supported by the witnesses in the Court is admissible u/s 25 of the Evidence Act. It is true that the provisions of Section 55 of the Act has not been complied with. According to Section 55 of the Act the seized Ganja was to be kept under the safe custody of the Officer Incharge of the police station under whose jurisdiction the seizure was made. However, in this case the material so seized was kept in the Godown of Custom Department and not under the custody of local police, as such mandatory provisions of Section 55 of the Act has not been complied with.

10. In this case the Appellant was sentenced to undergo rigorous imprisonment for 5 years and has already remained in jail for 3 years. In the facts and circumstances of the case, the conviction and sentence passed by the Court below is set aside and the Appellant is acquitted of the charges framed against him. It appears that the Appellant is in jail. He is directed to be released forthwith, if not required in any other case.

11. In the result, this appeal is allowed.