
(2008) 01 AP CK 0036

In the Andhra Pradesh High Court

Case No : Criminal Appeal No. 230 of 2002

Ediga Gangamma and Another

APPELLANT

Vs

State of Andhra Pradesh

RESPONDENT

Date of Decision : 29-01-2008

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 2, 22, 24, 29, 42

Citation : (2008) 1 ALD(Cri) 733 : (2008) 1 ALT(Cri) 374

Hon'ble Judges : G. Yethirajulu, J

Bench : Single Bench

Advocate : M. Ravindranath Reddy, for the Respondent

Judgement

G. Yethirajulu, J.—This Appeal is preferred by the Accused in S.C. No. 328 of 2001 on the file of the Additional Sessions Judge, Nalgonda.

2. The accused were charged for the offence u/s 22 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short "NDPS Act") for allegedly possessing 25 litres of toddy in a white plastic can on 22-08-1998 at the TFT toddy shop belonging to A-2 in Peddamanthur village. They denied the charges and claimed for trial.

3. The story of the prosecution leading to the conviction of the accused is briefly as follows:

The Excise Inspector, Penukonda along with his staff proceeded to Peddamanthur village on 22-08-1998 in a government van, picked up panchayatdars and visited the TFT Toddy shop of A-2 at about 1-40 PM. A-1 was present in the shop transacting toddy business. PW-4 found M.O.1 containing 25 litres of toddy. When A-1 was asked, she could not produce the licence and other records. PW-4 tested the toddy with the kit available with him and found positive for diazepam. He drew 650 ml toddy in glass bottles for the purpose of chemical analysis,

sealed and labeled them and destroyed the remaining adulterated toddy and arrested A-1. She stated that she was selling toddy at the instance of her husband (A-2) and she was having licence. PW-4 seized the empty can and bottles under the cover of panchanama covered by Ex.P-2 in the presence of PWs.1 and 2. He gave one sample to A-1 under acknowledgement. He brought the accused and property to the Excise and Prohibition Station, Penukonda and registered the crime. He sent the toddy samples for analysis and received the report of Analyst, which shows the presence of chloral hydrate and diazepam. After completion of the investigation, the charge sheet was laid.

4. The prosecution, in order to prove the guilt of the accused, examined PWs.1 to 4 and marked Exs.P-1 to P-5 and M.Os.1 and 2. No oral or documentary evidence was adduced on defence side. The accused in their 313 Cr.P.C. examination did not take any specific defence and simply denied the offence.

5. The learned Counsel for the Appellants submitted that though the scene of offence is mentioned as TFT Toddy shop, the boundaries were not mentioned and the neighbours were not examined to prove that the accused were running the toddy shop and were adulterating the toddy, therefore, the accused are not liable for prosecution.

6. The learned Public Prosecutor submitted that the evidence placed by the prosecution amply established the commission of the offence against the accused, therefore, the lower Court rightly convicted and sentenced them and there are no grounds to interfere with the same and the Appeal is liable to be dismissed.

7. In the light of the contentions of both parties, the point for consideration is:

Whether the prosecution proved the guilt of the accused beyond reasonable doubt and whether the convictions and sentences imposed by the lower Court are liable to be set aside?

8. The prosecution alleged that the accused were in possession of 25 litres of toddy, which was mixed with diazepam, therefore, they are liable to be convicted for the offence u/s 22 of the NDPS Act.

9. PW-1, who is one of the panchas for the panchanama conducted at the shop of the accused, stated that the panchanama was not conducted in his presence, but he signed on Ex.P-1 panchanama on 22-08-1998. In the cross-examination, he stated that the police obtained his signature at Penugonda P.S. and he does not know the contents of the same.

10. PW-2, who is another panch, also did not support the prosecution version. He turned hostile and stated that no panchanama was conducted in his presence and he signed on some papers at the police station. He denied a suggestion that the police conducted panchanama in his presence and he signed on it and he is speaking falsehood at the instance of the accused.

11. PW-3 is the then Constable of Excise Department at Penukonda. He deposed that on 22-08-1998, the Inspector conducted panchanama at Peddamanthur village in the presence of two Inspectors of Police, two Sub-Inspectors, one Head Constable and two panchayatdars. On that day at about 1-30 PM, on information they went to the toddy shop of A-1. The Inspector of Police took the samples of toddy and examined the toddy with chemicals and it turned into rose colour and he put the seals on the samples and obtained their signatures and conducted panchanama under Ex.P-2. Ex.P-2 contained his signature and it was conducted in his presence. In the cross-examination, he stated that the Inspector of Police took them in jeep. They checked some shops at Penukonda and Gonipenta. They left the police station at 8-30 AM. The shop of the accused is at a distance of 10 to 15 yards from the main road at Peddamanthur. There is no name board to the shop. The Sub-Inspector of police did not prepare the rough sketch of the scene of offence. Except the chemical kit, they did not take any material with them. The toddy was taken from the can into the bottles by lifting the can. The samples were sealed by the Inspector of Police. Later, the accused were arrested. The panchayatdars and the Inspector of Police signed the slips and the signatures of the accused were also taken in the punch slips. He denied a suggestion that the panchanama and the samples were also prepared in the police station. There is another toddy shop in the village, but he does not know the name of the owner of that toddy shop. He denied a further suggestion that at the instance of the other toddy shop owners, the case was foisted against the accused. He also denied a suggestion that the accused were arrested in their houses and the case was foisted.

12. PW-4, the Inspector of Police, Prohibition & Excise Police Station, Penukonda, during the relevant period, deposed that on 22-08-1998 the Excise Inspector, the Sub Divisional Task Force and the staff proceeded to Peddamanthur village in a government van, picked up panchayatdars on the way and proceeded to TFT Toddy shop of A-2 at 1-15 PM. A-1 was present in the shop and transacting the toddy business keeping a white plastic can, which contained 25 litres of toddy. He asked her to produce the licence, inspection books and other records. She did not produce the same. With the help of the kit, he tested the toddy to know whether it is mixed with diazepam and the Whatman paper turned into orange colour showing the presence of diazepam in the toddy. Then, he drew toddy samples for chemical analysis and labeled them in the presence of mediators and destroyed the remaining toddy and arrested A-1. A-1 stated that she was selling toddy at the instance of A-2 and she was having licence. He seized the toddy can and bottles under the cover of panchanama drafted on the spot in the presence of PWs.1 and 2 who were brought along with him from the same village. Ex.P-2 is the panchanama prepared for the seizure of the toddy. The panchanama was drafted by one Hanumanthappa, the Sub-Inspector of Police, and it was attested by him and panchayatdars. They started drafting panchanama at 1-40 PM and completed by 2-15 PM. He brought the accused and property to the Prohibition & Excise Station, Penukonda and registered the present crime. He sent the accused

for remand and the sample bottles to the Chemical Examiner. Later, he handed over his investigation to his successor.

In the cross-examination, he stated that in the routine raids he checked the shop of the accused. There is no name board to the shop. The shop is facing towards East. They did not prepare any observation report showing the boundaries of the shop. He denied a suggestion that they did not go to the shop of the accused and did not seize any samples and he is deposing falsehood. He seized the bottles personally and sealed them by affixing the labels signed by the panchayatdars and the accused. He denied a further suggestion that he did not follow the procedure u/s 24(b) of the NDPS Act. He further stated that there is one more toddy shop in the village apart from the shop of the accused, but he did not remember the name of the owner of the other toddy shop. He also denied a suggestion that the samples were seized from the shop of the Lakshminarayanappa and not from the shop of Lakshminarasappa.

13. PW-1, though admitted that the panchanama contained his signatures, stated that it was obtained in the police station. PW-2 also stated that his signature was obtained in the police station. PW-e supported the prosecution case. PW-4 is the Investigation Officer, who also supported the case of the prosecution.

14. The lower Court, on the basis of the evidence of PWs.3 and 4 and the admission of the signature of PWs.1 and 2, came to a conclusion that the prosecution proved the guilt of the accused beyond reasonable doubt. When A-1 was questioned during the 313 Cr.P.C. examination, she stated that they did not commit the offence. The Court convicted the accused for the offence u/s 22 of the Act and sentenced each of them to undergo imprisonment for a period of 10 years and also to pay a fine of Rs. 1,00,000/- each in default to suffer simple imprisonment for one year each. Being aggrieved by the same, the accused preferred the present Appeal.

15. The learned Counsel for the Appellants relied on several judgments in support of his contention that when there is no independent evidence, it is not safe to rely on the evidence of the police witnesses and requested to acquit the accused.

16. In Naushad Vs. State of Kerala, , a learned Single Judge of Kerala High Court held that conviction of the accused is not proper when the evidence do not show that the recovery of psychotic substances from the room occupied by the accused and it was in exclusive possession of the accused and when the complainant and the investigation officer is one and the same. It was further held that when there are incurable infirmities in the prosecution case, the conviction of the accused would not be proper in view of the fact that the accused was already in custody for more than four years. In the present case, it is not the plea of the accused that the toddy shop is in possession of anybody else and A-2 was found transacting business at the time of the officers raided the shop.

Therefore, the above decision is not applicable to the facts of the present case.

17. In Shaik Mahaboob Basha Vs. State of Andhra Pradesh, , a learned single Judge of this Court observed that the ganja was recovered from the house of the accused. There was no evidence that the accused was exclusive owner and occupier of the house and the evidence of witnesses also not establishing conscious possession of ganja by the accused. The Court held that the offence is not established. In the present case, A-2 was transacting the business by keeping the toddy in a plastic can, therefore, the facts of the present case are different from the facts of the case covered by the above decision.

18. In Shahidkhan v. Director of Revenue Intelligene, Hyd. 2001 (1) ALD (Cri.) 781 , a learned single Judge of this Court held that the prosecution failed to establish the offence when there was a doubt whether the drug seized was a narcotic substantive or not within the meaning of Section 2(xxiii) of the NDPS Act.

19. In State of Haryana v. Naresh Kumar 1997 CRI.L.J. 4702, a learned single Judge of Punjab and Haryana High Court held that the possession of diazepam is not prohibited under the rules. Diazepam covered by the Drugs and Cosmetics Act possessed by a person having licence does not amount to an offence u/s 8 of the NDPS Act. The facts of the above case are different from the facts of the present case, therefore, the above principle is not applicable to the facts of the present case.

20. In Pradeep Kumar Jain Vs. State of Rajasthan, , a learned single Judge of Rajasthan High Court, while dealing with the offences under Sections 8 and 29 of the NDPS Act, held that the charge against the accused that he conspired with others in transporting the contraband goods cannot be framed on mere basis of the statement of co-accused in the absence of any other evidence. Framing of the charge against the accused on the mere statement of the co-accused is not justified and the charge against the accused was quashed.

21. In Mohd. Alam Khan Vs. Narcotics Control Bureau and another, , the Supreme Court held that when the ownership and possession of the premises by the accused from which contraband articles were seized was not established, the accused is entitled to be acquitted. In the present case, the accused did not deny the ownership of the premises and there was no suggestion that the premises belonged to some other person.

22. In S. Jeevanantham v. The State Through Inspector of Police, Tn 2004 (4) SUP 245, it was contended that the Inspector registered the FIR after search and recovery, being the complainant, himself conducted investigation, therefore, the investigation done by him is illegal. The Court held that the accused failed to point out any circumstances by which investigation caused prejudice or was biased against the appellant and the Investigation Officer was not in any way personally interested in the case, Therefore, the conviction could not be disturbed. The above decision rendered by the Supreme Court is answer to the contention of the Appellants that the complainant and the investigation officer

are one and the same.

23. In *Matta Prasad v. State*, Prohibition and Excise Circle 2005 (1) ALT (Cri.) 472 , a learned single Judge of this Court held that when there is no compliance of mandatory provisions of Section 42 of the NDPS Act, search and seizure are vitiated and the convictions and the sentences are liable to be set aside.

24. The learned Counsel for the appellants submitted that the investigating officer on information proceeded to the shop of the accused and seized the contraband without putting the information into writing. The conviction is vitiated and unwarranted. In support of his contention, the learned Counsel relied on a Judgment of this Court in *Ankireddy Ramana Reddy v. State* of 2005 (2) L.S. 138, wherein this Court held that the investigating officer did not state whether he kept the information in writing and whether he sent any report to higher officials about the information he received. In the absence of such material trial must be held to have been vitiated and the conviction must be held to be unwarranted since he failed to comply the provisions of Sections 42, 50 and 57 of the NDPS Act. In the present case, the raid of the shop was made in the process of routine raids. The raid party was covering many areas and ultimately reached the shop of the accused, therefore, the question of receiving their information earliest does not arise and the above decision is not applicable to the facts of the present case.

25. In *P.P. Fathima v. State of Kerala* 2003 (8) SUP 62, the Supreme Court held that in a case under NDPS Act merely a panch witness not supporting the prosecution case by itself would not make the prosecution case less acceptable if otherwise the Court was satisfied that the seizure was genuinely made. In the present case, the prosecution party raided the shop of the accused and observed A-1 transacting the business by keeping the toddy in a plastic can. The toddy was tested with the chemical kit taken by the investigating officer and on testing, the colour of the toddy turned to pink, therefore, he suspected that it was mixed with diazepam and sent the sample for analysis and the chemical analyst report disclosed that the sample contained chloral hydrate and diazepam.

26. PWs.1 and 2 stated that they do not know what are the contents of the panchanama covered by Ex.P-2 and admitted the signatures, which is an indication that the samples were collected at the toddy shop in the presence of the mediators and they are properly labeled and sealed with the signature slips of the mediators and the accused. Though it was suggested by the accused that the procedure prescribed for seizure of the samples was not followed, they did not specifically point out as what was the prescribed procedure that was violated. From the evidence of PWs.3 and 4 it is amply established by the prosecution that the samples were collected from the plastic can in possession of A-2 while transacting business and there was no explanation from the accused except suggesting that the samples were not taken from their shop. Though the accused stated that the police foisted the case against them, there was no specific reason as to why the case was foisted against them without there being any motive for

implicating them in the present crime.

27. In the light of the decision of the Supreme Court in Fathima's case (10 Supra), though the panch witnesses halfheartedly supported the prosecution case, there is acceptable evidence to establish the guilt of the accused.

28. In the light of the above legal position and in the light of the material available on record, I am in concurrence with the view of the lower Court that the prosecution proved the guilt of the accused beyond reasonable doubt, therefore, the accused were rightly convicted for the offence u/s 22 of the NDPS Act. Hence, the conviction imposed by the lower Court against the accused is confirmed.

29. So far as the sentence is concerned, the lower Court imposed the sentence of imprisonment of 10 years and also to pay Rs. 1,00,000/- on each of the accused by treating the offence u/s 22(b) of the NDPS Act. Though the accused alleged to be in possession of 25 litres of toddy, the quantity of diazepam mixed in the toddy is not mentioned. But, in my assessment it would be a small quantity, which was mixed in the toddy, therefore, the offence can be brought u/s 22(a) of the NDPS Act and the sentence of imprisonment can be reduced to six months and the fine amount of Rs. 1,00,000/- can be reduced to Rs. 10,000/-.

30. In the result, the Criminal Appeal is allowed in part. The convictions of both the accused for the offence u/s 22 of the NDPS Act is confirmed. But the sentence of imprisonment imposed on the accused u/s 22(b) is modified into one u/s 22(a) of the NDPS Act. The sentence of imprisonment of ten years imposed by the lower Court on each of the accused is modified by reducing the same to rigorous imprisonment of six months and the fine of Rs. 1,00,000/- imposed on each of the accused is reduced to Rs. 10,000/- and the default sentence of one year is reduced to simple imprisonment of two months on each of the accused.