
(2013) 04 DEL CK 0409
In the Delhi High Court
Case No : Criminal Appeal 773 of 2010

Hannan

APPELLANT

Vs

State of NCT of Delhi

RESPONDENT

Date of Decision : 11-04-2013

Acts Referred:

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

Citation : (2013) 3 JCC 94 : (2014) 2 RCR(Criminal) 258

Hon'ble Judges : Mukta Gupta, J

Bench : Single Bench

Advocate : S.K. Sethi, for the Appellant; Manoj Ohri, APP., for the Respondent

Judgement

Mukta Gupta, J.—By the present appeal, the Appellant impugns the judgment dated 26th March, 2010 whereby the Appellant has been convicted for offence u/s 20(b)(ii)(c) NDPS Act for illegal possession of 40 kgs of Ganja and the order on sentence dated 29th March, 2010 directing him to undergo rigorous imprisonment for 10 years with a fine of Rs. 1 lakh and in case of default of payment of fine to further undergo simple imprisonment for three months. Learned counsel for the Appellant contends that no independent public witness was associated with the recovery, despite the recovery being from a crowded place. The narration of the events is highly improbable as no person would be standing with such a huge quantity of contraband at the bus stop near a Police booth. The Appellant is not involved in any other similar case. The samples of 1 kg and 2 kgs were taken, however when they reached the FSL the weights were different. There is an unexplained delay in sending the specimen samples to the CFSL as the alleged recovery was made on 25th July, 2006 and the samples were sent on 28th August, 2006. There are material contradictions in the statements of witnesses regarding the colours and descriptions of the bag. There is contradiction in the statements of the witnesses regarding the colour of substance recovered. Further the alleged contraband recovered does not fall within the definition of "Cannabis" as defined u/s 2(iii)(b) NDPS Act as the same

had leaves and stems. There is discrepancy in the statement of the witnesses regarding the seals affixed. PW5 Nirmal Kumar stated that after sealing the samples and the case property the seals were handed over to HC Shamim Akhtar PW9. However, PW9 is silent about the receipt of the seals and till when they were in his custody. The details of the FSL form were not given in the register No. 9 though mentioned in the road certificates. Reliance is placed on Rajesh Jagdamba Avasthi Vs. State of Goa, , Sehdev Vs. State , Balban Singh Vs. State and Sadhu Singh Vs. State of Punjab 1997 (3) Crimes 55 (P&H). Thus, the Appellant be acquitted of the charges framed.

2. Learned APP on the other hand contends that seals of VK and VPD belonging to PW5 and PW10 were affixed on the samples and the case property. As per the CFSL report when the samples were tallied with the sample seals, the seals were found to be tallying and intact. Even as per the expert the recovered contraband was Cannabis as defined u/s 2(iii)(b) NDPS Act. Further the definition itself shows that when the leaves and twigs are accompanying the flowering or fruiting tops, the same are called "Ganja" and the leaves and twigs are not required to be separated therefrom. All the witnesses have spoken about filling of the FSL form. There is no contradiction in the statement of the witnesses regarding the colour of the contraband recovered as the witnesses have stated pink or pinkish orange colour. Reliance is placed on State of Haryana Vs. Mai Ram, P.P. Beeran Vs. State of Kerala, State of Punjab Vs. Lakhwinder Singh and Another,

3. I have heard learned counsel for the parties. As per PW5 Nirmal Kumar, Inspector Customs Bombay, on 25th July, 2006 he was posted as Sub-Inspector at PS Hazrat Nizamuddin and was on vehicle checking duty along with HC Ram Chander PW2 and HC Shri Chand PW3 near Rajdoot Hotel, Mathura Road. At about 7:45 P. M. while he was checking vehicles, he saw a person coming from the side of Rajdot Hotel bus stand carrying two bags on his shoulders, one suitcase in hand and one suitcase lying on the ground on which he had put his leg. On becoming suspicious PW5 apprehended him and made a formal enquiry about bags and suitcases. However, no satisfactory reply was given. The Appellant tried to escape from the place, however he was apprehended and he disclosed his name as Hannan. When the suitcase, he was carrying in his hand was checked, one orange colour polythene packet tied in sutli and tape was found which contained Ganja as per the smell. On this PW5 asked 4-5 public persons to join the proceedings, however none agreed. Notice u/s 50 of the NDPS Act was prepared and handed over to the Appellant. The Appellant was informed about his legal right to be searched before a Gazetted officer or a Magistrate, if he so desired but he refused. PW5 informed Additional SHO on the telephone about the recovery. Other bags and suitcases were also searched and they were also found containing Ganja. The four bags were given serial Nos. 1 to 4. 15 kg Ganja was recovered from the black colour suitcase which the Appellant was having in his hand and was given serial No. 1. From the blue colour bag which the Appellant was having on his left shoulder, 5 kgs Ganja was recovered which was given serial No. 2. Further 5 kgs of Ganja was recovered from the

other bag on the right shoulder of the Appellant and was given serial No. 3 and 15 kg of Ganja was recovered from the cream colour suitcase which was placed on the ground by the Appellant and was given serial No. 4. Thus, a total of 40 kgs of Ganja was recovered. From the suitcases serial No. 1 & 4, 2 kgs of Ganja was separated as sample whereas from the two bags given serial No. 2 & 3, 1 kg of Ganja each was separated as sample. Separate sample parcels were prepared and converted into pullandas and were sealed with the seal of NK. Samples were given the serial No. S1, S2, S3 & S4. Form FSL was filled on spot and sealed. Case property was placed in the same bags and suitcases and sealed. Additional SHO PW10 reached the spot to whom the entire recoveries and form FSL etc., were handed over and he put his own seal of VPD which he was carrying. Rugqa was prepared by SI Nirmal Kumar and handed over to HC Shubh Karan who took the same to the Police station and an FIR was registered. PW2 and PW3 HC Ram Chander and HC Shri Chand reiterated the version of PW5 and the investigation was handed over to PW4 SI Satbir Singh who conducted the personal search of the Appellant, arrested him and later sent the samples along with form FSL through HC Shamim Akhtar vide RC No. 80/21 to FSL Rohini.

4. Learned counsel for the Appellant has assailed the recovery on the ground that the version of the Police officers is highly improbable as no person would be carrying such a huge quantity at a public place i.e. a bus stand near a Police booth. A perusal of the testimony of the witnesses shows that the contraband was kept in suitcases and bags and thus the Appellant was disguising as a traveller and the version of the prosecution cannot be said to be highly improbable.

5. As regards the difference in weights of the samples sent from the two suitcases given serial No. 1 & 4, 2 kgs of Ganja was separated and from the 2 bags given serial No. 2&3, 1 kg of Ganja each was separated. As per the FSL report the weights of the four samples S1, S2, S3, S4 were 1940 gms, 969 gms, 1013 and 1884 gms with Polythene. The same would show that it is approximately the same as stated by the witnesses and minor variations are bound to occur in the weight taken by a normal scale and an electronic scale. Thus, the difference in the weights of the samples received is not fatal to the case of the prosecution.

6. Learned counsel for the Appellant has strenuously contended that as per the FSL report Ex. PW4/C Ex. S1, S2, S3 & S4 were dried vegetative material along with twigs and twigs are not Cannabis. Section 2(iii)(b) NDPS Act 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. A perusal of the FSL report Ex. PW4/C shows that the twigs were along with the vegetative material which is the flowering and fruiting tops identified as dried Indian hemp i.e. Ganja. The chromatographic examination Ex. S1 to S4 showed that the samples contained Tetrahydrocannabinol which is the main constituent of Cannabis plant. Thus, the

objection of the Appellant is liable to be rejected.

7. The next aspect pertains to securing of the custody of the samples till they were sent to FSL and the case property. Statement of PW8 MHC(M) Bhaiya Ram is relevant in this regard. He states that on 25th July, 2006 he was posted at PS Hazrat Nizamuddin and was working as MHC(M). On that date Inspector V.P. Dahiya deposited two suitcases, two bags and four samples duly sealed with the seal of NK and VPD along with FSL form which he entered at serial No. 2843 of register No. 19 and deposited the case property in the malkhana. On 28th August, 2006 he sent the four samples of this case to FSL Rohini through HC Shamim Akhtar vide RC No. 80/21/06. He further states that on 18th October, 2006 he received all the four samples along with the result through Constable Shamim duly sealed with the seal of FSL and deposited the same in the malkhana. However, the most material aspect has not been stated by this witness in his examination-in-chief, i.e. as long as the samples and the case property remained in his custody the same were not tampered with. Further PW2 HC Ram Chander stated that seal after use was given to HC Shamim Akhtar. HC Shamim Akhtar PW9 in his testimony does not say that the seal after use was handed over to him. This witness also had taken the samples to the FSL, however he does not say that till the time he deposited the samples in the FSL the same were not tampered with.

8. As regards the contradiction with regard to the colour of the polythene bags and the colour of the contraband recovered, it may be noted that PW2 has stated that black Ganja was recovered from Pink panni, one suitcase and both the bags, whereas PW3 and PW5 has stated that black colour Ganja was recovered from pinkish orange polythene kept in the two suitcases and two hand bags. Further PW2, PW3 & PW5 have stated that cream colour Ganja was recovered from the other suitcase. Thus a perusal of the testimony of the witnesses show that there is some contradiction with regard to the colour of the contraband recovered from the polythene bag in which they were found. In view of the fact that the two material witnesses PW8 MHC(M) Bhaiya Ram and PW9 Ct. Shamim Akhtar in whose custody the case property was did not state that the case property was not tampered with, I am of the considered opinion that the prosecution has failed to prove the link evidence. In view of the peculiar facts of the case, the Appellant is acquitted of the charges framed. The appeal is disposed of. The Appellant be released forthwith if not required in any other case.