

(2012) 11 DEL CK 0102

In the Delhi High Court

Case No : Criminal A. 426 of 2010 and Criminal A. 847 of 2010

Ibrahim (Mohd.)

APPELLANT

Vs

State of NCT of Delhi

RESPONDENT

Date of Decision : 27-11-2012

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 293, 428
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 20, 20(b)(ii)
(c), 50, 57, 61

Citation : (2013) 1 AD 6 : (2013) 1 JCC 1

Hon'ble Judges : A.K. Pathak, J

Bench : Single Bench

Advocate : Aditya Wadhwa and Mr. Deepak Vohra, for the Appellant; Fizani Hussain, APP, for the Respondent

Final Decision : Allowed

Judgement

A.K. Pathak, J.—Appellants have been convicted u/s 20(b)(ii)(c) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short hereinafter referred to as "the Act") by the trial court; sentenced to undergo rigorous imprisonment for ten years each with fine of Rs. 1 lac each and in default of payment of fine to undergo simple imprisonment for six months. Benefit of Section 428 Cr. P.C. has also been extended to them. Aggrieved by their conviction as also the sentences as handed down to them by the trial court, appellants have preferred the above noted appeals, which arise from the same incident, FIR and judgment; thus, are disposed of together.

2. Prosecution case as set out in the charge-sheet is that PW2 ASI Yeshpal Singh was present in the Police Station Tilak Marg, New Delhi on 25th July, 2005 at about 3 PM when a secret informer contacted him and informed that two young boys, who were Bangladeshi nationals, used to sell "ganja" and they would de-board a train at Tilak Bridge Railway Station between 4 to 5 p.m. with large quantity of "ganja" and would go to Gokulpuri, in an auto rickshaw. Information

was recorded in daily diary. PW 2 ASI Yeshpal Singh also informed this fact to PW 6 Station House Officer Inspector Satya Pal Singh, who in turn passed on this information to Assistant Commissioner of Police Niranjan Singh, who directed for conducting of a raid to apprehend the culprits. Accordingly, PW 2 ASI Yeshpal Singh formed a raiding party comprising of PW 3 Constable Rakesh Kumar and PW 4 Constable Satish Kumar. Thereafter, raiding party reached near the staircase of Tilak Bridge Railway Station at about 3:30 PM. Five-six passersby were requested to join the raiding party but they showed their inability to join the proceedings. Raiding party took position near the staircase.

3. At about 4 PM two boys were seen coming down from the staircase. Mohd. Ibrahim (whose name was disclosed after his apprehension) was carrying two brown coloured rexine bags on his shoulders and one blue coloured suitcase in his right hand. Modu (whose name was also disclosed after his apprehension) was carrying a black coloured rexine bag. Both of them were intercepted. Notice u/s 50 of the Act was served on the appellants and they were asked, whether they wanted to be searched in presence of a Magistrate or Gazetted Officer at which they stated that they were not willing to be searched before a Magistrate or Gazetted Officer. Raiding party searched the bags and suitcase, which Ibrahim was carrying and green coloured leaves were recovered. Similarly, from the bag of Modu similar kind of leaves were recovered. It was found to be "ganja". The total quantity of ganja recovered from Mohd. Ibrahim was 51 kg; whereas the total quantity of ganja recovered from Modu was 29 kg. Sample of 1 kg each was separately taken from each bag/suitcase and sealed in four separate pullandas with the seal of YPS. FSL forms were also prepared at the spot Seal was affixed on FSL form as well. The seal of YPS was handed over by ASI Yeshpal Singh (PW 2) to Constable Rakesh Kumar (PW 3). In the meanwhile. Inspector Satya Pal Singh (PW 6) along with his staff arrived there. He was informed about the seizure. He also affixed the seal of SPS on the pullandas and FSL forms. He took pullandas, FSL forms along with carbon copy thereof in his possession and later deposited the same in the malkhana on the same day.

4. Rukka Ex. PW 2/A was prepared by PW 2 ASI Yesh Pal Singh wherein above facts were mentioned and the same was sent to police station per hand PW 1 Constable Satish Kumar for registration of FIR and pursuant thereof FIR No. 301/2005 under Sections 20/ 61/ 85 of the Act Ex. PW 4/A was registered.

5. After registration of FIR, investigation was handed over to SI Sanjay Singh (PW 7), who reached the spot, took personal search of appellants, arrested them and sent the report u/s 57 of the Act detailing above facts to Additional Commissioner of Police through the Reader of Station House Officer. Later, he collected pullandas from malkhana and deposited the same at FSL, Rohini. As per the chemical examination report, sample was found containing "Tetrahydrocannabinol", which was the main constituent of Cannabis plant. As per the biological examination report, sample was found to be "female flowering portions of Indian Hemp", that is "ganja".

6. PW 1 Constable Satish Kumar, PW 2 ASI Yeshpal Singh, and PW 3 Constable Rakesh Kumar are members of the raiding party. It is the PW 2, who had received secret information and informed the same to PW 6 Inspector Satya Pal Singh, who was the Station House Officer of Police Station Tilak Marg. Raiding party was constituted on the direction of ACP Niranjan Singh who was informed about the secret information. Members of raiding party intercepted and seized the "ganja" from the appellants in the manner as described hereinabove. Samples were taken and sealed by PW 2 with his seal YPS. FSL forms were prepared. PW 6 Inspector Satya Pal Singh, who had also reached the spot, affixed his seal "SPS" on the pullandas and FSL forms. PW 7 SI Sanjay Singh is the Investigating Officer and had conducted the investigation after the registration of FIR. Only testimonies of police officials are available as no independent witness is stated to have joined the raid proceedings, despite efforts made by the PW 2. PW 1 to PW 3 and PW 6 have corroborated each other with regard to the receipt of secret information, forming of raiding party, apprehension of the appellants along with the ganja, its sealing and preparation of FSL forms. PW 6 has categorically deposed that when he reached the spot samples had already been sealed with the seal of YPS, inasmuch as, FSL forms were also prepared. He has deposed that sealed packets of samples along with FSL forms were handed over to him by PW 3. Thereafter, he also affixed the seal of SPS on the sealed pullandas as also on FSL forms. He has also deposed about depositing of the case property in the malkhana. PW 7 SI Sanjay Singh has stepped in the investigation after registration of FIR. He has deposed about arrest of appellants and his carrying the case property from malkhana to FSL, Rohini along with FSL forms on 18th August, 2005. Though in his examination-in-chief he did not depose about the FSL forms, but in his cross-examination conducted by the Additional Public Prosecutor he has clarified that he had also taken FSL forms along with the case property on 18th August, 2005. No witness from FSL has been produced, however, counsel for the appellants have contended that the same can be read u/s 293 of the Cr. P.C. Malkhana Moharrar {MHC(M)} ASI Bijender Singh has been examined as PW 5. He has proved the relevant entries in the stock room register as Ex. PW 5/A.

7. PW 1 to PW 3 have also deposed about the service of notice u/s 50 of the Act on the appellants before their search. PW 7 has deposed about forwarding of report u/s 57 of the Act to ACP Niranjan Singh. On the basis of the above evidence, trial court has concluded that the prosecution had succeeded in proving its case beyond reasonable doubt against the appellants that they were in conscious possession of contraband. By placing reliance on State of Punjab Vs. Balwant Rai, and Sanjiv Kumar Alias Sanju Vs. State of H.P., , trial court has held that huge quantity of ganja recovered from the appellants ruled out the possibility of implication as it was improbable to say that the police would implicate innocent persons in such a serious case by planting huge quantity of ganja on their person.

8. I have heard learned counsel for the appellants, learned APP for the State and

perused the trial court record carefully. I am of the opinion that the trial court has ignored the crucial point of non-compliance of mandatory provisions by the prosecuting agency giving rise to the suspicion regarding tampering of the case property. In this case, documentary evidence is not in line with the ocular versions given by the witnesses, with regard to handing over of the seals of YPS and SPS by the concerned officers to some third persons which indicate that the sample seals affixed on the pullandas remained in their possession only till the time case property was sent to FSL. That apart there is no cogent evidence there to prove that the CFSL forms, were prepared at the spot and sent to FSL. PW 2 ASI Yeshpal Singh has deposed that after affixing the seal of YPS on the sample pullandas he had handed over the same to PW 3 Constable Rakesh Kumar. Though PW 3 Constable Rakesh Kumar has corroborated this fact but the same is not corroborated from the documentary evidence. As per PW 3 Constable Rakesh Kumar, he had deposited the seal in the Malkhana. However, a perusal of the entries in the stock room register Ex. PW 5/A believes this statement. There is no entry in the stock room register in this regard. PW 6 Inspector Satya Pal Singh has not even deposed that he had handed over the seal to some other officials, meaning thereby, seal remained with him. Since seal remained with the concerned officer to which the same belonged possibility of tampering cannot be ruled out. In *Andrea Siddi vs. State of Goa*, CrI. A. No. 42 of 1997 dated 18th December, 1997 (Bom), it has been held thus, "it was pointed out that it is of utmost importance that there must be very cogent and trustworthy evidence on the part of the prosecution that the contraband seized is the same which is ultimately analysed by the Junior Scientific Officer and found to be contraband within the meaning of the NDPS Act and in order to ensure the same, the specimen seal assumes importance and it has great sanctity and value. It was further pointed out in the said judgment that the prosecution has to ensure that once the specimen seal which has been used for affixing on the contraband recovered and seal impression of the same was taken by the Search Officer, the seal should not be available with the Search Officer and there should be positive evidence on record that the said specimen seal was not within the reach of the Search Officer after the search and seizure formalities are completed and the impression of the specimen seal is taken.

9. As regards FSL forms, the same have not been placed on record nor proved. As per the prosecution, PW 7 SI Sanjay Singh had taken four pullandas from the malkhana along with FSL forms to deposit the same with FSL, Rohini on 18th August, 2005. However, relevant entries in the Stock Room register Ex. PW 5/A does not corroborate this fact. As per relevant entry, samples were sent to FSL, Rohini through SI Sanjay Singh vide Road Certificate No. 34/21/05 dated 18th August, 2005. In the Road Certificate dated 18th August, 2005 Ex. PW 5/B there is no mention of FSL forms. Learned Additional Public Prosecutor has vehemently contended that in the FSL report a reference has been made with regard to the "FSL forms" which indicates that FSL forms were sent along with the case property. I do not find any force in this contention. A critical scrutiny of FSL

report No. FSL. 2005/C-3259 dated 17th September, 2005 makes it clear that the forwarding letter has been construed "FSL form". The exact language in the report reads as under:-

Your letter no. 1298/SHO dated 18.08.05 regarding four parcel(s) in connection with case FIR No. 301/05 dated 25.07.05 U/s. 20/ 61/ 85 NDPS Act PS Tilak Marg duly received in this office on 18.08.05.

DESCRIPTION OF PARCELS & CONDITIONS OF SEALS

The Parcel(s) four in numbers marked "A", "B", "C & "G" which were sealed and tallied with specimen seal impression forwarded alongwith forwarding letter (FSL FORM)

10. Language used in the letter makes it clear that it is the forwarding letter which has been treated by the analyst as "FSL form" and for this reason; the words used are "FSL FORM" and not "FSL forms", inasmuch as, the words "FSL form" have been mentioned in bracket after the words Forwarding Letter. As per the prosecution, two FSL forms were prepared. Had FSL forms been sent to FSL and the report refers to said FSL forms, then the words "FSL forms" ought to have been used instead of "FSL form". Conspicuous absence of "FSL forms" creates a cloud of suspicion about their existence. It creates a serious doubt that the same had been prepared and sent to FSL, Rohini as has been projected. Resultantly, benefit of doubt goes in favour of appellants.

11. In Radha Kishan Vs. State, it has been held thus, "it is normal procedure that when the incriminating articles are seized and are required to be sent to the Central Forensic Science Laboratory, those articles are immediately sealed and deposited at the Malkhana at the police station till they are taken out and sent to the Laboratory. In the instant case, this was not done. Contemporaneously with seizure and sealing of such articles, impression of seal used on the seal is put on a form, commonly called, the CFSL form. This is so done because at the time of analysis of sealed packets in the laboratory, the analyst concerned is able to tally the seal impressions on sealed packets with those appearing on the CFSL form in order to rule out any possibility of tampering of seals on sealed packets after seizure anywhere or in transit till receipt in laboratory. The importance of the CFSL form thus cannot be overemphasized because this document provides a valuable safeguard to an accused to ensure that no tampering has been done during intervening period. The CFSL form is a document or forwarding note accompanying a sample sent by the police to Forensic Science Laboratory. Such a form contains the nature of the crime, list of samples being sent for examination, nature of examination required and specimen of the seal/seals affixed on the exhibit besides particulars of the case/police station".

12. In Radha Kishan case (supra), after referring to the Delhi High Court Rules, Part III Chapter 18B, regarding proper proof of custody of articles, it was held that the evidence of preparation and dispatch of the FSL form was critical for ensuring that the sealed sample was kept intact in the police malkhana and an

adverse inference would be drawn against the prosecution in the event the FSL form was not proved to have been prepared and dispatched. In Mool Chand Vs. State, it has been held that FSL form allegedly filled up at the spot, was neither deposited in malkhana nor was sent to CFSL along with the sample. The court held that recovery was suspicious.

13. In Satinder Singh Vs. The State (National Capital Territory of Delhi), this court has held that oral testimony, which is contrary to the documentary evidence, that is, register malkhana and the Road Certificate cannot be preferred unless evidence is led proving reasons for omission in the documents.

14. For the foregoing reasons, I am of the view that tampering of the sample cannot be ruled out in this case firstly in not handing over the said by the sealing officer to a third person; secondly, for lack of compliance of the mandatory provision that is preparation of FSL forms and forwarding the same to FSL along with sealed pullandas containing samples. In my view, prosecution has failed to prove the guilt of the appellants beyond shadow of reasonable doubt for the reasons detailed hereinabove. Accordingly, both the appeals are allowed. Appellants are acquitted by extending benefit of doubt. Appellants be released forthwith unless required in any other case. Copy of this order be sent to the Jail Superintendent for serving it on the appellants as also for compliance.