

(2011) 07 GUJ CK 0074
In the Gujarat High Court

Case No : Criminal Appeal No's. 2378 and 2380 of 2005

Pratapbhai Surjibhai Dodiya

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 05-07-2011

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 21, 22, 29, 8, 8(C)

Citation : (2011) 07 GUJ CK 0074

Hon'ble Judges : Bankim N. Mehta, J; A.L. Dave, J

Bench : Division Bench

Advocate : Rajesh M. Agrawal, for the Appellant; K.L. Pandya, APP, for the Respondent

Final Decision : Allowed

Judgement

A.L. Dave, J.—These two appeals arise out of a judgment and order dated 22.9.2005, rendered by Special Court, Gandhinagar, in Special Case (NDPS) No. 3 of 2004, convicting the Appellants for the offences punishable under Sections 8(C), 21 and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the "NDPS Act" for short). For the first offence, they were sentenced to undergo RI for 10 years and to pay fine of Rs. 1,00,000/- and, in default, to undergo RI for two years and for the second offence, they were sentenced to undergo RI for 10 years and to pay fine of Rs. 1,00,000/- and in default, to undergo RI for two years. Both the sentences were ordered to run concurrently.

2. As per the prosecution case, the Appellants were intercepted on 21st August, 2004 at about 10.45 a.m. at Gandhinagar - Chiloda circle, on Gandhinagar - Himmatnagar Road, near Rajasthani Dhaba Pandit Jaipurwala's Hotel. Accused No. 1 Pratapbhai Surjibhai Dodiya was found to be in possession of 766 grams of brown sugar whereas accused No. 2 Aasif Shabbirbhai

Bugadwala was found to be in possession of 205 grams of brown sugar. The contraband was seized, samples were drawn and were sent to FSL for analysis. The seized contraband and samples were properly sealed at the time of seizure. The accused were arrested and charge sheeted. Before the Special Court, charge was framed against them at Exhibit-10 for the offences punishable under Sections 8(C), 21 and 29 of the NDPS Act, to which they pleaded not guilty and claimed to be tried. At the end of trial, the Special Court came to the conclusion that the prosecution was successful in proving the case that both the accused were in possession of contraband brown sugar in the quantity as stated here-in-above and, therefore, after recording their statements u/s 313 of the Code of Criminal Procedure and hearing their arguments, the Special Court delivered the judgment holding them guilty and sentencing them as stated here-in-above.

3. Learned Advocate Mr. Rajesh M. Agrawal, appearing for the Appellants pressed both these appeals mainly on the ground that the contraband seized, even as per the prosecution case, was brown sugar and FSL report only certifies it to be brown sugar. FSL has not undertaken the purity test to suggest the exact quantity of contraband found in the quantity of powder seized and, therefore, the Appellants would be entitled to the benefit available to them in light of the decision of the Apex Court in the case of E. Micheal Raj Vs. Intelligence Officer, Narcotic Control Bureau, The rest of the contentions raised are not pressed by the learned Advocate appearing for the Appellants.

4. Learned APP Mr. K.L. Pandya has opposed both the appeals. According to him, the contraband seized was brown sugar and the requisite contents were found in the laboratory test and, therefore, the conviction cannot be said to be ill-founded. So far as punishment is concerned, Mr Pandya submitted that, it would commensurate with the quantity of contraband seized. Mr. Pandya further submitted that the fine is also imposed after due consideration and, therefore, this Court may not interfere with the judgment and order of the Special Court. He, therefore, urged to dismiss both the appeals and confirm the judgment and order of conviction and sentence recorded by the Special Court against the Appellants.

5. We have examined the record and proceedings and have given our due consideration to the contentions raised. We do not deal with any other contentions than the contention regarding the purity test, for the reason that, those contentions are given up by learned Advocate for the Appellants.

6. The FSL report is at Exhibit-46. It reveals that the samples were received by the laboratory in sealed condition and after performing the test, it was opined that the sample was contraband - brown sugar.

7. The report, however, does not state the exact quantity or percentage of the substance noticed in the samples. Now, in this context, if the decision of the Supreme Court, in the case of E. Micheal Raj (supra) is seen, Their Lordships observed that "heroin is an opium derivative as per Section 2(xvi)(e), which

says that all preparations containing more than 0.2 per cent of morphine or containing any diacetylmorphine is an opium derivative."

Thus, the court concluded that the offending substance was an opium derivative and, hence, manufactured drug, the possession of which is in contravention of the provisions of Section 8 of the NDPS Act, which prohibits certain operations to the effect that no person shall produce, manufacture, possess, sell, purchase, transport, warehouse, etc. In that case, the opium derivative was found in possession of the Appellant. The punishment prescribed under Sections 21 and 22 of the NDPS Act provide different parameters for different categories of offences, depending upon the quantity of contraband found, namely, small quantity, commercial quantity or lesser than commercial quantity but more than small quantity. The offence defined under the provisions is in respect of the narcotic drugs or psychotropic substances and when the material seized is found to be carrying only part of the prohibited item, such percentage would be essential for deciding whether it was a small quantity or a commercial quantity or a quantity lesser than the commercial quantity but more than small quantity. When such percentage is not there, the court is unable to decide firmly and confidently that the quantity of material seized was pure quantity of the prohibited item or the contraband or what was the percentage of contraband mixed with some other substances.

8. In the instant case, when the laboratory test has not revealed the percentage, as held by the Apex Court in the case of E. Micheal Raj (*supra*), the benefit has to go to the accused.

9. In the instant case, though, the Appellants are convicted for the offences punishable under Sections 8(C), 21 and 29 of the NDPS Act, the evidence in the form of FSL report produced by the prosecution is incomplete. It is, therefore, not possible to come to a concrete conclusion whether the contraband seized was a small quantity or a commercial quantity or a quantity lesser than the commercial quantity but more than small quantity. In our view, in light of the decision of the Apex Court, in absence of percentage of the pure quantity of contraband in the seized material, the benefit should extend to the accused. The contraband seized from accused No. 1 is 766 grams of brown sugar and accused No. 2 is 205 grams of brown sugar. The quantity seized from accused No. 2 is a small quantity whereas the quantity seized from accused No. 1, being 776 grams, is a commercial quantity. But in absence of purity test and its report, it is difficult to conclude what was the exact quantity of the contraband in the blended substance seized from the Appellants respectively. The Special Court therefore erred in sentencing them for 10 years RI and fine of Rs. 1 lac each for the offences punishable under Sections 8(C) and 21 and 29 of the NDPS Act respectively. In view of the fact that the evidence regarding purity is not collected by the prosecution, it cannot be said that the entire 776 grams of brown sugar seized from the accused No. 1 was 100% brown sugar. It would, therefore, be appropriate that the quantity is treated by one step down i.e.

quantity which is less than the commercial quantity but more than the small quantity, the punishment prescribed for is rigorous imprisonment for a term which may extend to 10 years and a fine which may extend to Rs. 1 lac . The Appellant - accused No. 1 has been in jail since 21st August, 2004. The appeal, therefore, deserves to be partly allowed and while confirming the conviction of the Appellant No. 1 u/s 8C & 21 of the NDPS Act, his sentence is reduced to 6 years rigorous imprisonment with a fine of Rs. 50,000/- and, in default, to undergo SI for six months.

10. So far as accused No. 2 is concerned, he is found in possession of 205 grams of brown sugar, which is more than small quantity but less than commercial quantity. Therefore, it will have to be treated as a small quantity for which the sentence prescribed is rigorous imprisonment for a term which may extend to six months or with fine which may extend to Rs. 10,000/- or with both. Therefore while confirming his conviction under Sections 8C & 21 of the NDPS Act, we allow his appeal partly by reducing his sentence to six months with a fine of Rs. 10,000/- and in default to undergo SI for 15 days.

11. We also noticed that there is no material on record to show that a conspiracy was hatched by the accused persons. Ocular evidence of the Investigating Officer on this point does not inspire confidence because he states that he received information and found material during investigation but what was that material is not divulged. He states that he recorded the statements of witnesses but does not site them as witnesses in the charge sheet. Necessary inference is that the statements of these witnesses did not bring out material that may help the prosecution. The charge and conviction of accused persons under Section-29 of the NDPS Act cannot be said to be well founded and deserves to be set aside.

12. Hence, the following order:

Criminal Appeal No. 2378 of 2005 is partly allowed. While confirming the conviction of the Appellant for the offences punishable under Sections 8(C) and 21 of the NDPS Act, the sentence imposed on the Appellant-accused No. 1 Pratapbhai Surjibhai Dodiya is reduced to 6 years rigorous imprisonment with a fine of Rs. 50,000/- and in default to undergo SI for six months.

So far as Criminal Appeal No. 2380 of 2005 is concerned, the same is partly allowed. While confirming the conviction of the Appellant for the offences punishable under Sections 8(C) and 21 of the NDPS Act, the sentence imposed on the Appellant-accused No. 2 Aasif Shabbirbhai Bugadwala is reduced to six months rigorous imprisonment with a fine of Rs. 10,000/- and in default to undergo SI for 15 days.

The conviction of both the Appellants - accused for the offence punishable u/s 29 of the NDPS Act is hereby set aside.