
(2009) 09 CAL CK 0046
In the Calcutta High Court
Case No : C.R.A No. 462 of 2006

Sonam Bahadur Gurung

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 09-09-2009

Acts Referred:

Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 21, 23, 42, 50, 52A

Citation : (2009) 09 CAL CK 0046

Hon'ble Judges : Kalidas Mukherjee, J; Ashim Kumar Banerjee, J

Bench : Division Bench

Advocate : Rupna Bhattacharya Roy, for the Appellant; Prasun Datta, for the Respondent

Final Decision : Dismissed

Judgement

Ashim Kumar Banerjee, J.—On April 17, 1999 Sonam Bahadur Gurung, holding Passport from Nepal, was waiting at the Calcutta Airport to board the Thai Flight, TG-314 going to Bangkok. On an intelligence information the Customs Authority intercepted him. His checked-in baggage was brought from the luggage hold. On examination of the baggage in presence of Gurung, 6 Kgs. of black sticky substance was recovered which was kept in the suitcase at its inter bottom panel. On a primary examination with the help of necessary kit, the substance was found to be Hasish being a contraband drug under the Narcotic Drugs and Psychotropic Substance Act, 1985 (N.D.P.S. Act of 1985). Gurung was immediately arrested and he is still under detention.

2. Gurung was subsequently charge-sheeted under the provisions of Section 21 and 23 of the N.D.P.S. Act. He was ultimately held guilty of the offence and was imposed a sentence of twelve years Rigorous Imprisonment. As of date Gurung already suffered detention of more than ten years in jail custody.

3. Being aggrieved, Gurung preferred the instant appeal which was heard by us on the above mentioned date.

4. Mrs. Rupna Bhattacharya, learned Counsel appearing in support of the appellant contended as follows:

i) The prosecution contended that they had intercepted Gurung based on an intelligence report, the source of such information was, however, not disclosed at the trial.

ii) u/s 50 of the N.D.P.S. Act, the accused was entitled to be searched in presence of Magistrate or a Gazetted Officer. In the instant case, no such opportunity was given to the appellant. Hence, the proceeding was vitiated by illegality.

iii) u/s 42 of the N.D.P.S. Act, 1985, the Investigating Officer was duty-bound to note down the information, in writing, received by him to be informed to his superior officer. Such provision was performed in breach.

iv) Altogether nineteen packets/slabs were recovered whereas sample was not drawn from each of the packets/slabs. Hence, the final report on the sample examination could not be relied upon to hold that the appellant was carrying the entire consignment being Hashish.

v) There were anomalies found out in evidence which were self-contradictory :

a) The prosecution witnesses were not sure with regard to the quality of paper used for packing those slabs.

b) P.W.11 described the consignment as "slabs" whereas P.W. 9 described it as "packets".

c) Charge-sheet shows that the consignment was black whereas the Chemical Analysis Report would show the same as brown.

d) No seal was put on the test report by the scientists who gave final report after Chemical Examination.

e) The Preliminary Test Report was not disclosed at the trial.

f) Original seizure list was not disclosed at the trial.

g) There was inordinate delay in depositing the materials at the godown. The seizure was conducted on April 17, 1999 whereas the consignment was received by the godown keeper on May 13, 1999, almost one month after the seizure. No explanation was given on that score.

h) There was discrepancy with regard to the weight of the samples as would be apparent from the test report.

5. Mrs. Bhattacharya contended that the anomalies and/or discrepancies so highlighted above would expressly manifest illegality committed during investigation and such illegality vitiated the process of trial. Hence, the conviction was liable to be set aside and the trial must end in an order of acquittal.

6. As and by way of alternative submission, Mrs. Bhattacharya reminded us that the accused already suffered more than ten years sentence and detained behind the bar. Hence, we should reduce the sentence and pass an order of release.

7. In support of her contention Mrs. Bhattacharya cited the following decisions :

i) Gaunter Edwin Kircher Vs. State of Goa, Secretariat Panji, Goa, t Page-1456.

ii) Antony Okoye v. The State reported in 1997 CLR (Cal) 22.

iii) Ahmed v. State of Gujarat reported in 2000 Cal CLR (SC) 449.

iv) Tej Bahadur Singh and Another v. Narcotic Control Bureau and Anr. reported in 2000, 1 CHCN803.

v) Jadunandan Roy v. State of West Bengal reported in 2000 CWN 373

vi) State of West Bengal and Ors. v. Babu Chakraborty reported in 2004 SCC (Cri) Supp 174.

vii) State of Gujarat v. Ismail U. Haji Patel and Anr. reported in 2004 SCC (Cri) Supp 395.

viii) Rajesh Jagadamba Avasthi v. State of Goa reported in 2006 1 SCC (Cri) 150.

ix) Dilip and Anr. v. State of Madhya Pradesh reported in 2007 1 Scc (Cri) 377.

8. Opposing the appeal Mr. Prasun Datta, learned Counsel appearing for the Customs Authority contended that the consignment was seized from the suitcase which was identified and claimed by the accused himself of his own. Hence, question of compliance of Section 50 of the N.D.P.S. Act did not arise. In any event, no such plea was taken by the accused at the time of trial. Mr. Datta also relied on various statements made in writing by the accused on his own volition during interrogation which were exhibited during the trial. Mr. Datta lastly contended that the entire investigation had been conducted following the strict mandate of the N.D.P.S. Act. The Court below rightly held the accused guilty of the offence and sentenced him accordingly. No interference was called for by the Court of appeal.

9. In support of his contention Mr. Datta cited the decision of the Apex Court in the case of Mohd. Hussain Farah Vs. Union of India and Another, Page-329.

10. To decide the controversy let us first discuss the precedents cited at the Bar.

11. Paragraph 5 of the Apex Court decision in the case of Gaunter Edwin Kircher v. State of Goa (Supra) was relied upon by the Mrs. Bhattacharya to support her contention that the sample had been drawn not from all the slabs/packets and it would not be safe to hold that the entire consignment of weighing 6 kgs. was contraband article in accordance with the provisions of the N.D.P.S. Act. We have carefully analyzed the evidence. It nowhere came specifically in evidence as to how the sample was drawn. No objection was raised by the accused with regard

to drawing of sample. Hence, her contention that the seized article so confiscated as Hashish was a "small quantity" and not a "commercial quantity", cannot be accepted.

12. Mrs. Bhattacharya relied on the Division Bench decision in the case of Antony Okoye v. The State (Supra) to support her contention that there had been a missing link in the chain of events so proved by the prosecution. She relied on paragraph 43 of the said decision wherein the Division Bench relying an Apex Court precedent, held that the seized article was produced after a period of more than three months and there was no evidence with whom the seized article had been lying. The Division Bench also observed that the articles appeared to have not been kept in proper custody. Considering such fact the Division Bench observed that the accused could not be convicted. In the instant case, the articles were seized in the presence of the accused. Sample was drawn in his presence and was sent for examination instantly. The rest part of the consignment was, thereafter, kept in the godown as would be appearing from the evidence. It is true that there had been delay of about a month with regard to deposit of the rest of the materials. The Court below convicted the accused on the strength of the chemical analysis report and the weightment of the entire consignment done in the presence of the accused immediately after seizure. Hence, this judgment also cannot help the accused to get an order of acquittal.

13. Mrs. Bhattacharya also cited the Apex Court decision in the case of Ahmed v. State of Gujarat (Supra) to support her contention that provision of Section 50 was not complied with. From the facts, narrated above, it would appear that the accused was not searched on his person. The consignment was seized from a suitcase identified by him of his own. Hence, this judgment also does not help us to decide the instant case.

14. In the case of Ahmed v. State of Gujarat (Supra), the contention raised by the prosecution that since the concerned officer himself was a gazetted officer there was no requirement of compliance of Section 50 was not accepted. Such is not the case here.

15. Mrs. Bhattacharya also relied upon another Division Bench decision of this Court in the case of Taj Bahadur Singh (Supra). The decision relates to noncompliance of Section 52-A which deals with disposal of seized Narcotic Drugs. We do not find any support from this decision to deal with the present case.

16. Mrs. Bhattacharya relied on Jadunandan Roy v. State of West Bengal (Supra). On the issue of interference of Section 50 the Division Bench observed that a gazetted officer of the department could not be set up as "independent person" within the meaning of Section 50 of the said Act.

17. In the case of State of West Bengal and Ors. v. Babu Chakraborty (Supra) cited by Mrs. Bhattacharya, the Apex Court in paragraph 28 held that since mandatory provisions were not complied with the accused would be entitled to

acquittal.

18. In the case of *State of Gujarat v. Ismail U. Haji Patel and Anr. (Supra)* cited by Mrs. Bhattacharya, the Apex Court observed that the prosecution would have to establish that the seized articles were in proper custody and samples sent to chemical analysis must relate to the seized article.

19. In the case of *Rajesh Jagadamba Avasthi v. State of Goa (Supra)*, cited by Mrs. Bhattacharya, the Apex Court observed that the Court must find out whether there was an actual seizure and whether what was seized, was really sent for chemical analysis.

20. Mr. Bhattacharya lastly cited the Apex Court decision in the case of *Dilip and Anr. v. State of Madhya Pradesh (Supra)*. Paragraph 16 of this decision was relied upon. The Apex Court therein observed that the provisions of Section 50 might not have been required to be complied with so far as the search of scooter is concerned, but, keeping in view the fact that the person of the appellants was also searched it was obligatory on the part of the PW-10 to comply with the said provisions. It was not done. This decision, in our view, would rather support the conviction. The accused was not searched on his person. He identified his suitcase wherefrom the seized articles were found. Hence, provision of Section 50 was not attracted.

21. Mr. Datta cited the Apex Court decision in the case of *Mohd. Hussain Farah v. Union of India and Anr. (Supra)*. In the said decision the accused was in a hotel. From his room where he was staying, two packets containing 3.8 kg of Heroine was found. It also appeared from the evidence that he was the only person staying in that room. Based on such evidence the Apex Court upheld the conviction.

22. On a sum total of the ratio decided in the precedents as discussed above, our understanding of the law is that when the accused is searched on his person the compliance of Section 50 is mandated. However, when the articles are seized not from his person but proved to be belonging to him the protection u/s 50 is not available to the accused. We are prompted to observe so in view of the latest decision of the Apex Court in the case of *Dilip and Another (Supra)*. Hence, the contention of Mrs. Bhattacharya on that score, is rejected.

23. With regard to the anomalies pointed out by Mrs. Bhattacharya we are of the view that even if those anomalies are considered and we give credence to those it would not vitiate the ultimate decision which the Court below arrived at.

24. The accused was waiting at the Air Port. He was intercepted at the stage when he was about to board the flight. His luggage was brought from the luggage-hold. He identified his suitcase. The intelligence staff opened the suitcase and found the contraband articles from the inter-bottom panel of the suitcase. Samples were drawn in his presence and was sent for chemical analysis. The report reveals that the articles were "Hashish" which is contraband

within the mischief of N.D.P.S. Act, 1985. The Trial Court convicted him in this backdrop and sentenced him accordingly. We do not find any scope of interference.

25. The appeal fails and is, hereby, dismissed.

26. There would be no order as to costs.

27. Urgent xerox certified copy would be given to the parties, if applied for.

Kalidas Mukherjee, J.

28. I agree.