

CASE NO.:
Appeal (crl.) 956 of 2004

PETITIONER:
Union of India

RESPONDENT:
Munna and Anr.

DATE OF JUDGMENT: 27/08/2004

BENCH:
ARIJIT PASAYAT & C.K. THAKKER

JUDGMENT:
J U D G M E N T
(Arising Out of S.L.P. (Crl.) No. 4126 of 2003)

ARIJIT PASAYAT, J.

Leave granted.

The Union of India calls in question legality of the judgment rendered by a Division Bench of the Allahabad High Court holding that respondent no.1 (hereinafter referred to as the 'accused') was not guilty of the offence punishable under Section 20(b)(2) and Section 23 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (in short the 'NDPS Act'). The Trial Court i.e. the 1st Additional Sessions Judge, Siddharthnagar had convicted the accused guilty for the aforesaid offences, and sentenced him to undergo imprisonment for 15 years and pay a fine of rupees one lakh with default stipulation.

Accusations which led to the trial of the accused are essentially as follows:

On 17.10.1994 at about 6.30 p.m. Inspector of Customs Sri B.K. Srivastava, Incharge Customs Station Khunwa, District Siddharthnagar, received an information that a person carrying Charas from Nepal shall be passing through the Customs Barrier (Khunwa Check Post). Consequently, Sir B.K. Singh, complainant (PW-1) summoned two independent witnesses and took position near the Barrier. At about 7.00 p.m. a Jeep bearing No. UTD 5560 was seen coming from Nepal side and when it reached near the Barrier, the Customs Officer stopped the Jeep for its checking. Accused who was the sole occupant of the Jeep stopped the vehicle. The Customs Officer in presence of witnesses told the accused that search of his person and the Jeep is to be taken because there is information that charas is concealed in the cavity of the Jeep. He was also informed that if he so desired he shall be taken before a Gazetted Officer for the purpose of search. Accused replied that the Officer may himself take his search and there was no necessity to take him before any Gazetted Officer. The Officer along with witnesses on inspection of the Jeep was satisfied that the Jeep contained a Cavity. Subsequently the Jeep along with the accused was brought to the Customs Office and in the presence of witnesses cursory search of the Jeep resulted in the discovery of a cavity and from smell it was clear that in this cavity charas was cleverly concealed. The Officer immediately sent Sepoy Sri Saghir Ahmad to Badhni with a request that Superintendent (Customs) Badhni may come immediately for

the search of seized jeep which contained charas in its cavity. The Superintendent came from Badhni early in the morning at about 7.00 a.m. next day and in his presence the search of the Jeep was conducted and charas concealed in the cavity weighing 100 Kg. of the value of Rs.10,00,000/-, was recovered. Samples were taken out, sealed in separate packets which contained signature of the accused, witnesses and the officer and the remaining charas was duly sealed. Since transportation of charas was in violation of Section 8 of the N.D.P.S. Act, the Jeep containing the charas was also seized.

A Panchnama of the said recovery, interrogation and seizures was prepared at the spot which were signed by the accused, witnesses and the Customs Officer.

The prosecution i.e. Union of India filed the criminal case no.68 of 1994.

According to the complaint, statements of the accused recorded by the Inspector and the Superintendent are voluntary statements, and admissible in evidence.

In his voluntary statements recorded the accused clearly admitted the time, place and mode of recovery of the seized charas which was cleverly concealed in the Jeep driven by him. The statements are Exts. Ka.2 and Ka.5 on the record.

The Customs Officer duly arrested the accused on 18.10.94 and produced him before the competent court. One of the packets of the sealed sample of this charas was sent to chemical examiner for analysis and a report from the chemical examiner was received along with the envelope in which the sample was sent to him. The report and the envelope were attached with the complaint and were Exts. Ka-3 and Ka-4. They were proved by PW-1. The report clearly established that the article recovered from the possession of the accused was charas.

In order to substantiate the allegations four witnesses were examined. Sri B.K. Srivastava, Inspector, Customs Station, Mahendra Singh (PW-2), Superintendent Badhni who had come to the scene of occurrence on the next day to supervise the recovery. Sita Ram (PW-3) @ Laddu is the witness of recovery. Mantra Prasad (PW-4) is the Inspector Customs Khunwa. He was authorized by an order dated 10.11.1994 by his superior officer to conduct the investigation in the case and prosecute the accused.

On consideration of the evidence on record the Trial Court found the accused guilty and recorded conviction as aforesaid. The same was challenged by an appeal before the Allahabad High Court. Following points were urged to assail legality of the judgment.

1. The accused was not in conscious possession of the contraband concealed in the vehicle accompanied by the fact that source of information has not been disclosed.
2. That there is non-compliance of Sections 42 and 43 of N.D.P.S. Act.
3. That the only so called independent witness has not supported the prosecution case. It casts serious doubt in the recovery of the contraband.
4. Failure of investigation to make full report of all particulars to his immediate superior and non-compliance of procedure laid under Section 57 of the N.D.P.S. Act, is fatal for the prosecution.
5. That no fair and proper option as required under Section 50 of the N.D.P.S. Act was given to the accused before taking his search.

According to the High Court the factual position indicated that the accused was not the real culprit. The owner of the vehicle and two other persons who accompanied the accused for a part of the journey were real culprits. It came to hold that the accused only possessed Rs.150/- at the time of his arrest and he did not run away. In any event, the prosecution has failed to prove conscious possession. It was also observed that there was violation of Section 42 of the Act. The High Court felt that instead of accused, the authorities should have gone after the owner of the vehicle and the other two persons who were operating the same. The judgment of the Trial Court was set aside.

Learned counsel for the appellant submitted that the High Court has proceeded on mere surmises and conjectures. The fact that accused was the driver and he had Rs.150/- at the time of arrest or that he was having a salary of Rs.1500/- per month are not relevant for adjudicating the guilt or otherwise of the accused. Undisputedly, on the basis of voluntary statements of the accused recorded by the Customs authorities, he had knowledge about contraband being carried in the vehicle. The two persons to whom the High Court had made reference were for a short time traveling in the vehicle. It is true that owner of the vehicle may have some role to play in the crime but that is not sufficient to hold that the accused was not guilty. There was specific evidence on record about information given to the superior authorities and the High Court has not considered the same and erroneously concluded violation of Section 42. It was therefore submitted that the High Court was not justified in its conclusions.

Learned counsel for the State of U.P. supported the stand of the appellant. There is no appearance on behalf of the accused in spite of service of notice.

We find that the High Court has not analysed the evidence in its proper perspective and has acted on surmises and conjectures. It has also acted on irrelevant materials leaving out of consideration relevant matters. The fact that there was admission of the accused before the Customs authorities has not been dealt with by the High Court. Such admission is not hit by either Section 25 or Section 26 of Indian Evidence Act, 1872 (in short the 'Evidence Act'). The effect of such admission was a relevant factor. Additionally, the effect of Section 54 which raises presumption from possession has not been considered and on the contrary, burden has been placed on the prosecution and it has been held that prosecution was to establish that the possession was conscious. The effect of the evidence relating to dispatch of information to the superior authorities has also not been considered.

In view of the unsatisfactory analysis of evidence and erroneous approach to the statutory prescriptions, we consider this to be a fit case which needs to be adjudicated afresh by the High Court. We remit the matter to the High Court for fresh adjudication in accordance with law taking into account the evidence on record and applicable provisions of the governing statute.

Appeal is disposed of accordingly.