

CASE NO.:
Appeal (crl.) 1201 of 2005

PETITIONER:
Ravindran @ John

RESPONDENT:
The Superintendent of Customs

DATE OF JUDGMENT: 14/05/2007

BENCH:
B.P. SINGH & TARUN CHATTERJEE

JUDGMENT:
JUDGMENT

WITH
CRIMINAL APPEAL NO.1202 OF 2005
Peter John
Versus
The Superintendent of Customs

\005Appellant

\005Respondent

B.P. Singh, J.

The appellants herein with one other namely, Hiralal were tried by the Special District and Sessions Judge, Madurai in Crime Case No.320 of 2001 charged of the offences under Section 8 (c) read with Sections 22 and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the "Act"). Learned District & Sessions Judge by his judgment and order dated November 20, 2002 found them guilty of the offences with which they were charged and sentenced them to undergo rigorous imprisonment for 10 years and to pay a fine of Rs.1,00,000/- and in default to undergo further rigorous imprisonment for 2-1/2 years. Each one of the accused aggrieved by the judgment of the Trial Court preferred an appeal before the High Court of Judicature at Madras. The Criminal Appeal preferred by the appellant Ravindran @ John was registered as Criminal Appeal No.1144 of 2003 while the appeal of Peter John was numbered as Criminal Appeal 14 of 2003. The High Court by its impugned common Judgment and Order dated April 2, 2004 upheld the conviction of the appellants but acquitted Hiralal against whom it found no satisfactory evidence to prove the charges. The appellants have preferred the instant appeals by special leave.

CRIMINAL APPEAL NO.1201 OF 2005

1. The facts of the case are that PWS 1 and 2 who were officials of the Customs Sea Base Party, Tiruchendur on receiving specific information rushed to the Kayalpattinam Bus Stand at about 3.00 a.m. on December 21, 2000 since there was reliable information that one person carrying psychotropic substance was to come there. At the bus stand they found appellant Ravindran and on suspecting him to be the person concerned they informed him that they are going to conduct personal search and asked him whether he would like the search to be conducted before a Judicial Magistrate or a Gazetted Officer. The appellant did not insist on his search before a Magistrate or Gazetted Officer. He was searched by PWS 1 and 2 in the presence of two independent witnesses namely, Ravi and Chandrasekar. The appellant was found to be carrying a white coloured polythene bag. On searching the bag one polythene packet was found inside the bag which was opened in the presence of the independent witnesses. It was found to contain white colour powder. On being asked the

appellant informed them that the substance was Diazepam. The same was, therefore, seized under Mahazar, Ex. P-2. The packet was sealed and brought to the Customs Office since there was no facility to weigh the substance and to prepare samples at the bus stand. The two independent witnesses also accompanied the appellant and PWs 1 and 2. On weighing, the substance was found to weigh 1.528 Kilograms. Two representative samples each weighing 5 grams were drawn and sealed in two separate covers which were duly packed, labeled and sealed with the customs seal. According to the prosecution the substance seized was worth about Rs.75,000/-.

2. The case of the prosecution is that on further questioning the appellant confessed his guilt and his confessional statement Exb. P-4 was recorded. From the confessional statement of the appellant, the involvement of the other two accused was revealed. The appellant was arrested on December 21, 2000 while the other two accused were arrested on December 23, 2000. Peter John (co-accused) admitted that the plastic bag containing white colour powder had been given to him by his friend Hiralal (co-accused) and that he had handed over the same to the appellant for sale.

3. The report of the Chemical Analyst established that the sample on being tested showed the presence of Diazepam. One other accused namely, Bharat Lal was found involved in the conspiracy. It appears that he absconded and therefore his trial was separated.

4. It was argued before the Trial Court as well as the High Court that the conviction of appellant Ravindran was not justified in view of non-compliance with the mandatory provisions of Section 42(2) of the Act. It was also contended that the independent witnesses were not examined at the trial and that was fatal to the case of the prosecution. The trial was also vitiated for non-compliance with the mandatory provisions of Sections 50 and 57 of the Act. The report of the Chemical Analyst was challenged on the ground that he had not tested the sample for its components. The percentage of purity of the sample was therefore not proved. The Trial Court as well as the High Court concurrently held that there was no substance in any of the grounds urged on behalf of the aforesaid appellant. Some of those points have been urged before us as well. We find no substance in any of the points urged before us.

5. The submission that Section 42 of the Act was not complied with has been rejected by the High Court holding that Section 42 was not at all attracted to the facts and circumstances of the case. It also recorded a finding that even if attracted, it had been complied with.

6. We hold that the High Court was right in coming to the conclusion that Section 42 of the Act was not attracted to the facts of this case. In the instant case on information received by PW-2 who communicated the same to PW-1, the witnesses went to the bus stand where the person carrying the drug was expected to arrive. The appellant was arrested at the bus stand. The appellant was, therefore, not searched and arrested in exercise of power of arrest, search, and seizure under Section 42 of the Act. Section 42 applies to a case where the officers concerned on information received, or having reason to believe from personal knowledge that any offence has been committed in relation to any drug or psychotropic substance etc. and which is kept or concealed in any building, conveyance or enclosed place may, between sunrise and sunset, enter into and search any building, conveyance or place. They are also vested with the power of search and seizure and authorized to arrest the person whom they have reason to believe to have committed any offence punishable under this Act. The facts of this case disclose that the arrest and seizure took place at the bus stand and not in any building, conveyance or enclosed

place. The High Court has rightly held that the case was covered by Section 43 of the Act which does not require the information of any person to be taken down in writing. Similarly, there is no requirement that the concerned officer must send a copy thereof to his immediate official superior within 72 hours. We, therefore, hold in agreement with the High Court that Section 42 of the Act was not attracted to the facts of the case. It is, therefore, unnecessary to burden this judgment with decisions cited at the Bar regarding the effect of non-compliance with Section 42 of the Act.

7. It was then submitted on behalf of the appellant that the provisions of Section 50 of the Act which are mandatory in nature were not also complied with. Reliance was placed on decision of this Court reported in (1998) 8 SCC 534 *Namdi Francis Nwazor Vs. Union of India and Anr.* Learned Additional Solicitor General appearing on behalf of the Union of India submitted that the aforesaid judgment of this Court has been explained in a subsequent judgment of this Court in (2005) 4 SCC 350 *State of H.P. Versus Pawan Kumar* in which it has been held that the observations relied upon in *Namdi Francis Nwazor* were obiter on this point. In the later judgment it has been held as under:-

"A bag, briefcase or any such article or container, etc. can, under no circumstances, be treated as body of a human being. They are given a separate name and are identifiable as such. They cannot even remotely be treated to be part of the body of a human being. Depending upon the physical capacity of a person, he may carry any number of items like a bag, a briefcase, a suitcase, a tin box, a thaila, a jhola, a gathri, a holdall, a carton etc. of varying size, dimension or weight. However, while carrying or moving along with them, some extra effort or energy would be required. They would have to be carried either by the hand or hung on the shoulder or back or placed on the head. In common parlance it would be said that a person is carrying a particular article, specifying the manner in which it was carried like hand, shoulder, back or head etc. Therefore, it is not possible to include these articles within the ambit of the word "person" occurring in Section 50 of the Act".

8. In the instant case, it is not in dispute that the appellant was carrying a plastic bag in which the drug in question duly packed had been kept. Section 50 is, therefore, not attracted to the facts of this case.

9. It was, however, contended before us that PWs 1 and 2 had not informed the appellant of his legal right to get his person searched in the presence of a Gazetted Officer or a Magistrate. Merely informing him that he has an option to have his personal search done in the presence of a Gazetted Officer or a Magistrate was not sufficient and that he should have been informed of his legal right to get his personal search done in the presence of a Gazetted Officer or a Magistrate. In this connection, reliance is placed on the decision of this Court in (1999) 6 SCC 1 *Pon Adithan Versus Deputy Director, Narcotics Control Bureau, Madras*. It was, however, brought to our notice that the question as to whether the accused appellant is not entitled to be informed of his right to be searched in the presence of a Gazetted Officer or a Magistrate and that merely being asked as to whether the accused-appellant would like to be searched in the presence of a Gazetted Officer or a Magistrate would be sufficient compliance with the provisions of Section 50 of the Act, has been referred to a larger Bench of this Court to resolve the conflict of opinion on the interpretation of Section 50 of the Act. (See (2005) 12

SCC 574).

10. In our view this question does not survive for our consideration because we have earlier held that Section 50 was not attracted to the facts of this case. If any drug was recovered from the personal search of the appellant as explained in Pawan Kumar's case, the appellant could advance this argument to challenge his personal search. That not being the case, the submission must be rejected. An argument was advanced before us that if the search is found to be illegal that is fatal to the case of the prosecution. Apart from the fact that this question does not arise in the instant case, it cannot be said as a general principle of law that the illegality of the seizure would in all cases prove fatal to the case of the prosecution. As held by this Court in 2006 (9) SCALE 644 Ritesh Chakravarti Versus State of Madhya Pradesh although the effect of the illegal search may not have any direct effect on the prosecution case, it would all the same have a bearing on the appreciation of evidence of the official witnesses and other materials depending on the facts of each case.

11. Learned counsel for the appellant argued that the two independent witnesses in whose presence he had been searched were not examined at the trial. Reliance was placed on an observation contained in paragraph 28 of the report in (2004) 12 SCC 201 State of West Bengal and Others Versus Babu Chakraborty. In the instant case it is not disputed that two independent witnesses were associated when the search was conducted. The search was, therefore, conducted in accordance with law. But it is argued that failure to examine the two witnesses is fatal to the case of the prosecution. In our view, this is not the correct legal position. Even where independent evidence is not examined in the course of the trial the effect is that the evidence of the official witnesses may be approached with suspicion and the Court may insist on corroboration of their evidence. In (2000) 4 SCC 465 Koluttumottil Razak Versus State of Kerala this Court observed:-

"In the present case, unfortunately, apart from the evidence of the police officers there is absolutely no independent evidence to ensure confidence in our mind that the search was in fact conducted by PW \0261 as he has claimed. As his evidence is required to be approached with suspicion due to violation of Section 42 of the Act we may require corroboration from independent sources that is lacking in this case".

In (2003) 8 SCC 449 M. Prabhulal Versus Assistant Directorate of Revenue Intelligence, a similar question was raised in the context of the provisions of the NDPS Act. This Court held:

"Next, the learned counsel contends that the independent witnesses of the recovery of the contraband having not been examined and only police witnesses having been examined, the recovery becomes doubtful. Reliance is placed upon the decision in Pradeep Narayan Madgaonkar V. State of Maharashtra. In the decision relied upon while observing that prudence dictates that evidence of police witnesses needs to be subjected to strict scrutiny, it was also observed that their evidence cannot be discarded merely on the ground that they belong to the police force and are either interested in the investigating or prosecuting agency, but as far as possible, corroboration of their evidence in material particulars should be sought".

12. In the instant case we find that the courts below have critically scrutinized the evidence of the prosecution witnesses applying the rule of caution and we find no reason to disagree with their findings.

13. It was sought to be urged before us that evidence discloses that the confessions were not made voluntarily. We permitted the learned counsel to refer to the material on record and the concurrent findings recorded by the Trial Court and the High Court. We have noticed the fact that the confession was subsequently retracted. The courts have in our view correctly appreciated the material on record and have rightly come to the conclusion that apart from the confession of the appellant Ravindran there was also other reliable evidence on record to prove his complicity. We, therefore, find no merit in this submission.

14. It was lastly urged that though the Chemical Analyst had reported the presence of Diazepam, he had not given particulars as to the proportion in which its components were found. Counsel for the appellant placing reliance on the judgment of this Court reported in (2005) 7 SCC 550 Amarsingh Ramjibhai Barot Versus State of Gujarat submitted that this may have a bearing on the question of sentence. In the instant case, we are concerned with Diazepam. According to the Notification 20 grams of Diazepam is considered to be small quantity. Any quantity in excess of 500 grams is commercial quantity. In the instant case 1.528 Kilograms of Diazepam was found. In these facts the case is clearly covered by Section 22 (c) of the Act. We, therefore, find no merit in any of the submissions urged on behalf of the appellant Ravindran. His appeal fails and is, therefore, dismissed.

CRIMINAL APPEAL NO.1202 OF 2005

1. The appellant in this appeal is Peter John whose complicity was disclosed in the confessional statement of Ravindran. The appellant Peter John and Hiralal were arrested at Salem on December 23, 2000. They were brought to Madurai where their confessions were recorded which are Exbs. P-10 and P-11.

2. In his confessional statement appellant Peter John stated that the packet in question was given to him by Hiralal (since acquitted). Hiralal had told him that he had found the packet abandoned in the lavatory of a train and that it was a Narcotic drug and could be sold for profit. He, further, confessed that he had handed over the packet to appellant Ravindran for sale.

3. According to the confession of Hiralal Exb.P-11 he had got the packet from his friend Bharatlal (absconding accused No.4). He did not know the address of Bharatlal whom he had known for about a year and a half. He further admitted that he had handed over the contraband to Peter John for sale.

4. The prosecution relied upon the confessional statements to implicate the appellant as well as Hiralal. The defence on the other hand contended that Exb. P-10 and P-11 were obtained after prolonged custody since Custom Officials arrested them in Salem and later brought them to Madurai. It was also submitted that the confessional statements were subsequently retracted and, therefore, no reliance could be placed on them. The confessional statement of a co-accused could not be used as substantive evidence against the co-accused.

5. The High Court in its impugned judgment and order has found that the only piece of evidence against Hiralal, A-3 was the

confessional statement of the co-accused which could not be used against him and which was not sufficient to sustain the charge of conspiracy. It further noticed that according to Hiralal the contraband had been given to him by Bharatlal and in turn he handed over the same to appellant Peter John. The High Court observed that if he had really handed over the contraband to Peter John he would have certainly made enquiries about the sale of the contraband. Moreover, there is no mention about appellant Ravindran in his confessional statement. No doubt he admitted that he used to enquire from time to time as to whether the article had been sold, but the High Court concluded that that was not sufficient to establish the link between A-3 and A-2, much less the conspiracy between A-1, A-2 and A-3 namely, Ravindran, Peter John and Hiralal. The High Court also observed that the Court would not ordinarily act upon a retracted confession to convict the co-accused without corroboration in material particulars.

6. The High Court, however, distinguished the case of appellant Peter John holding that it was he who instructed Ravindran to go to the bus stand at Kayalpattinam on December 21, 2000 with the contraband. Moreover, appellant Ravindran and Peter John belonged to the same village. Appellant Peter John had brought the contraband from Salem to be handed over to Ravindran. Lastly, Peter John was frequently contacting Ravindran to know about the sale of the contraband.

7. It is not in dispute that the facts which have been relied upon by the High Court are culled out from the confession of Peter John. The question is whether the confessional statement of appellant Peter John is sufficient to uphold his conviction particularly when the same has been retracted and there is no other reliable evidence to convict him. In our view the benefit extended to Hiralal ought to be extended to appellant Peter John as well. The High Court did not find the confession of the co-accused reliable enough to be used either against him, or his co-accused. Appellant Peter John and Hiralal were arrested and brought to Madurai together and their confessions were recorded. The High Court has not considered it safe to act on the confession of Hiralal and acquitted him of the charge leveled against him. If the confession of Hiralal could not be used against him, certainly it could not be used against appellant Peter John a co-accused. Both the confessions were recorded one after the other. While in the confession of appellant Peter John it was stated that Hiralal had told him that he had found the packet abandoned in a running train, Hiralal in his confessional statement stated that he had received the packet from his friend Bharatlal and he had handed over the same to appellant Peter John. The High Court has not accepted this part of the prosecution story because in that event Hiralal would have been found guilty of having conspired to commit the offence or at least could have been found guilty of abetment since he had admitted that he had received the packet from Hiralal and handed over the same to appellant Peter John for sale. In these circumstances, the evidence that remains against the appellant Peter John is rather slender and it is not safe to uphold his conviction on such evidence, particularly when the person who is supposed to have given him the contraband has been given the benefit of doubt by the High Court. The charge against appellant Peter John is one of conspiracy to commit offences under the Act. The High Court has not accepted the involvement in the conspiracy of Hiralal who in his confessional statement claimed to have handed over the contraband to appellant Peter John. If the confessional statement of Hiralal is discarded, there remains no evidence except his own confession to implicate the appellant Peter John. The High Court did not find it safe to act on the retracted confession of Hiralal. The confession of the appellant was also recorded by the same team of officers at about the same time.

The appellant also retracted his confession.

8. In these circumstances we are of the view that appellant Peter John is also entitled to the benefit of doubt. We, accordingly, allow his appeal and set aside his conviction and sentence. He shall be released forthwith unless required in connection with any other case.

JUDIS