

Delhi High Court

Custom vs Jorawar Singh Mundy on 29 January, 2013

Author: Mukta Gupta

* IN THE HIGH COURT OF DELHI AT NEW DELHI
+ CRL.A. 14/2013

% Reserved on: 17th January, 2013
Decided on: 29th January, 2013

CUSTOM Appellant

Through: Mr. P.C. Aggarwal, Advocate.

versus

JORAWAR SINGH MUNDY Respondent

Through: Mr. Sanjay Kumar and Mr. Krishan
Kumar, Advocates.

Coram:
HON'BLE MS. JUSTICE MUKTA GUPTA

1. The present appeal is directed against the judgment of the learned Trial Court dated 30th April, 2011 whereby the Respondent was acquitted of the charges under Sections 21 (c) and 23 read with Sections 28 and 29 of the Narcotics Drugs and Psychotropic Substances Act, 1985 (in short the NDPS Act).

2. After hearing the parties, leave to appeal was granted by this Court on 4th January, 2013 and the appeal was set for hearing for today as the Respondent is a resident of USA.

3. Learned counsel for the Appellant submits that the learned Trial Court acquitted the Respondent on three counts, that is, non-compliance of Section 50 of the NDPS Act, possession of alleged contraband being not in a conscious possession and that the case property was not secured properly by the prosecution. As regards non-compliance of Section 50 of the NDPS Act, learned counsel for the Appellant states that since the recovery was from the baggage and not from the personal search of the Respondent, the mandatory compliance of Section 50 of NDPS Act was not required to be done. However, still notice under Section 50 NDPS Act was served on the Respondent when the search was taken. Reliance is placed on *Ajmer Singh vs. State of Haryana*, 2010 (1) LRC 278 (SC), *Khet Singh vs. Union of India*, 2002 (1) JCC 588 (SC) and *Vimal Kumar Bahl vs. DRI*, 2009 (113) DRJ

540. Regarding possession of the contraband not being conscious, learned counsel for the Appellant has taken me through the evidence on record and it is contended that PW11 Jitender Grewal at whose house the Respondent was staying and who had allegedly given the bag to the Respondent was examined before the learned Trial Court who clearly stated that the suitcase was given to the Respondent however, the same only contained his grand daughters clothes and sandals as she was to go on 24th May, 2009 to USA and the suit case was not locked. No suggestion has been made to this witness that the contraband belonged to him or that the suitcase was locked. Further the statement of the Appellant was recorded under Sections 108 of the Customs Act and 67 of the NDPS Act which are admissible against him. In the statements the Appellant admitted his mistake and did

not state that the suitcase belonged to someone else. As regards the finding that the case property was not properly secured, it is contended that learned defence counsel could take out the property only after opening the stitches on both the sides. Thus the stitches being intact the case property cannot be said to be tampered with. Reliance is placed on State of Haryana vs. Mai Ram, son of Mam Chand, 2008 (3) JCC Narcotics 188 SC to contend that the prosecution version does not become vulnerable for non-examination of non-official witnesses. Thus even if the panch witnesses had not supported the prosecution case, in view of the testimony of the official witnesses, the Respondent is required to be convicted for the offences charged.

4. Learned counsel for the Respondent contends that since personal search of the Respondent was taken before the search of the baggage, Section 50 of the NDPS Act was required to be complied with. Reliance is placed on Dilip and another vs. State of Madhya Pradesh, AIR 2007 SC 369 and Kishan Chand vs. State of Haryana, MANU/SC/1120/2012 decided on 13th December, 2012. It is contended that when the punishment is harsh then meticulous compliance of the necessary provisions is required to be carried out and the principle of substantial compliance has no application. Ex. PW3/A the alleged notice under Section 50 of the NDPS Act does not inform the Respondent of his legal right to be searched before a gazetted officer or Magistrate. Further the same is a computerized print out thus showing that the raiding team was aware that the Respondent was allegedly carrying the contraband or at least they had an apprehension regarding the same. Further PW9 the Investigating Officer has categorically stated that the Respondent was not searched after notice under Section 50 of the NDPS Act was served on him as he had already been searched after serving notice under Section 102 of the Customs Act. PW3 and PW12 the panch witnesses have not supported the prosecution case. Thus the only witness for recovery is PW9 the Investigating Officer. Even PW9 in his testimony states that he believed that the version of the Respondent that Sukhjinder Singh had given him the bags for delivery in USA was correct. Thus the Respondent was not in conscious possession of the contraband which is further fortified by the fact that in both suitcases clothes of young girl were recovered. The granddaughter of PW11, whose clothes were sent through the Respondent, was not examined as a witness. Further the defence had clearly demonstrated before the learned Trial Court that keeping the seals intact the plastic container containing the alleged contraband could be removed from the pullanda. Thus the case property was not properly secured and the learned Special Judge committed no error in acquitting the Respondent.

5. I have heard learned counsel for the parties.

6. Briefly the case of the prosecution is that on 15 th May, 2009 the Respondent holder of USA Passport No. 057061445 while leaving for San Francisco via Taipei by Air China Airlines was intercepted at the customs counter when he was proceeding for security check. He was asked whether he had any currency or contraband which he denied. Since the customs officer was not satisfied he called the panch witnesses and in their presence he asked the same question to which the Respondent again replied in the negative. The Respondent was carrying one air bag and had already checked in two baggages. The checked in baggages were called through airlines which were identified by the Respondent as his baggages. The said baggages consisted of one green colour suit case and other blue colour suit case having marking "Polo Class USA". Notices under Section 102 of

the Customs Act and Section 50 of the NDPS Act were served on the Respondent and he was given option to get himself and his baggages examined before a gazetted officer of customs or a Magistrate to which the Respondent stated that he had no objection for the aforesaid search by any custom officer. From the green colour bag one polythene containing black colour paste was recovered which was further kept in a polythene marked Om Sweet Private. The said substance weighed 1300 grams. From the same baggage one more white colour plastic container was recovered which had light brownish powder and underneath the powder one polythene packet containing black colour paste was recovered, which black colour paste weighed 1500 grams. From the blue suit case one more white colour plastic container was recovered again containing light brownish powder and underneath the same one polythene containing black colour paste weighing 2800 grams. The black colour paste from the three packets gave positive indication for morphine on Field Test Kit. The total weight of Morphine recovered was found to be 5600 grams. Representative samples of 25 grams each were drawn from three packets and were duly sealed with paper slips containing signatures of the accused, panch witnesses and the recovery officer. The test memos were also filled in triplicate and the remaining substance was kept in the polythene bags and further kept in polythene bag marked ALPHA wrapped with brown colour adhesive tape, then kept in a cylindrical steel container and then sealed in a cloth pullanda. The cloth pullanda was sealed with paper seal bearing the signatures of the Respondent, panch witnesses and the recovery officer. The statement of the Respondent was recorded under Section 67 of NDPS Act on the same date wherein he stated that he came to India on 10 th May, 2009 along with one Sukhjinder Singh, who is also a US citizen, known to the Respondents family and went to Chandigarh in his car. They stayed there at the house of one Shri Grewal who was known to Mr. Sukhjinder Singh. The two of them visited Moga for some property transactions and on 14th May, 2009 they came back to Mr. Grewals house at Chandigarh. Sukhjinder Singh paid for his airlines tickets from San-Francisco to Delhi and 900 US dollars and Rs. 10,000/- for shopping out of which he spent Rs. 8,500/- and returned Rs. 1,500/-. On 15th May, 2009 he left Chandigarh and reached Delhi airport with two stops in between and at the departure parking driver off loaded the car and placed the suit cases on the trolley. Then he walked towards counter of China Airlines. At the departure parking he was told by Sukhjinder Singh that he had to carry two suit cases containing some clothes and articles of the grand daughter of Shri Grewal who had to go for studies to USA after some time. The said suit cases were to be delivered at the residence of the brother of Sukhjinder Singh in USA. He gave mobile numbers of the brother of Sukhjinder Singh etc. and that Sukhjinder Singh paid all the bills and purchased the tickets with intention to implicate him in illegal activities of smuggling and narcotics. He accepted the recovery of the black colour paste in the three separate packets.

7. As regards compliance of Section 50 of the NDPS Act the legal position is well settled as also laid down in Ajmer Singh (supra) that in case the recovery is not from the personal search but from the baggage non- compliance of Section 50 would not vitiate the trial as the search of a bag does not amount to personal search so as to attract Section 50 of the NDPS Act. Thus the version of the witness that before notice under Section 50 NDPS Act was given after the Respondent had already been searched and the notice under Section 50 not informing the legal right of being searched before a gazetted officer or a magistrate would not be fatal in the present case. The reliance of the Respondent on the decision in Dilip (supra) is misconceived as in the said case the Honble Supreme Court clearly noted that from the facts on record the learned Sessions Judge was of the opinion that

there was likelihood of the Investigating Officer having prior information and thus compliance of Section 50 of the NDPS Act was held to be mandatory. Further there was material non-compliance as in the purported notice time, date, name, residence etc. of the officer giving notice had not been disclosed and the accused was also not informed of the legal right.

8. In the present case the most material aspect is whether the prosecution has been able to prove that the contraband recovered was kept in a safe custody and the same was not tampered with. In this regard it would be appropriate to note the observation of the learned Additional Sessions Judge while the statement of PW9 the Investigating Officer Shri Madhusudan, Superintendent, Customs was being recorded. While the Investigating Officer was exhibiting the case property the learned defence counsel demonstrated that the steel container could be removed from the cloth pulanda without tampering with the seals on the paper slips and at the bottom. The relevant portion of the testimony of PW9 is as under:

"At this stage, one cloth pulanda stitched on one side from top to the bottom with a paper slip affixed on the top of the pulanda stitched with the jute string and then further pasted with the help of salo tape, the paper slip bearing three seals of customs 06 on its top and one seal on the bottom is produced. The defence counsel has submitted that pulanda can be opened without removing the seals affixed on the top and bottom of the pulanda. Defence counsel is permitted to demonstrate the same. At this stage, defence counsel has taken out the steel container from cloth pulanda by removing the stitching without tampering the seals on the paper slip and at the bottom."

9. It is thus apparent that the case property was not secured properly and without tampering with the seals on the paper slip the case property could be removed from the cloth pulanda after opening the stitches. In a case of recovery of narcotic drug it is the paramount duty of the prosecution to prove beyond reasonable doubt that the case property allegedly recovered from the accused was kept in safe custody and no tampering was done therewith. Where the case property can easily be removed without tampering with the seals, the sacrosanct onus cast on the prosecution has not been discharged. Thus the learned Trial court committed no error in coming to the conclusion that the case property had not been secured properly.

10. Taking this position as it is it may be noted that besides the case property three samples were drawn at the time of alleged recovery which were sent to the CRCL for analysis. There is no allegation that the samples sent to CRCL were tampered with. Thus the learned counsel for the Appellant presses that if not for the commercial quantity of possession of 5600 grams of morphine the Respondent should be convicted for the possession of the three samples, that is, 25.9 grams, 26.0 grams and 29.2 grams, that is, total of 81.1 grams of morphine which as per the CFSL report Ex. PW2/A was found to be properly sealed, tallying with the specimen seals and contained morphine therein. However, to fasten the liability of this 81.1 grams of morphine the prosecution has to prove beyond reasonable doubt that the Respondent was in conscious possession of the said contraband. It is evident from the statement of the Respondent that he was given the two suit cases by Sukhjinder Singh at the departure. Further the cross-examination of PW9 on this point is also

relevant wherein the Investigating Officer admitted the suggestion that he did not verify the foreign address of the recipient of the bag at USA since he believed the statement of the accused recorded under Section 67 of the NDPS Act to the effect that the said bags were handed over to him by Sukhjinder Singh for delivery at USA and he was not aware of the contents of the same. Once the Investigating Officer was satisfied that the Respondent was not in the conscious possession of the contraband he ought to have made investigations qua Sukhjinder Singh. However, in this regard the Investigating Officer himself stated that he made no interrogation from Sukhjinder Singh nor tried to trace him. PW11 Shri Jatinder Grewal at whose house the Respondent stayed has stated in his testimony that before leaving for Delhi Airport both Serge Dhaliwal and the Respondent Jorawar Singh Mundy offered that they had very little baggage and they could carry some of the things of his grand daughter, that is, clothes etc. as she was going for long stay and thus he gave her clothing and shoes in a blue colour mark Polo unlocked suit case. He further reiterated that before loading the said suit case in the car Serge Dhaliwal and the Respondent opened the bag and checked the contents therein. Further the case of prosecution in the present case is based only on the testimony of PW9 as the two panch witnesses PW3 Ashit Roy and PW12 and Himanshu have turned hostile. No doubt, conviction can be based solely on the testimony of the Investigating Officer as regards the recovery however, in the present case the testimony of PW9 the Investigating Officer is full of blemishes. Further PW11 in his examination-in-chief states that only Shri Serge Dhaliwal @ Sunny offered in the absence of the Respondent to carry one suit case of his grand daughter in case she had any excess baggage to take in flight to USA on 24th May, 2009. In any case PW11 had handed over only one bag and the second bag was of Mr. Sukhjinder Singh. In view of the deficiencies in the investigation carried out, I do not find it fit to convict the Respondent even for the possession of 81.1 grams of morphine. The learned Trial Court rightly did not raise the presumption under Sections 35 and 54 of the NDPS Act in view of the fact that the prosecution has failed to discharge its initial burden where after the presumption could be raised against the Respondent.

The impugned judgment cannot be said to be suffering from perversity or gross illegality and the view taken by the learned Additional Sessions Judge is a plausible view and hence calls for no interference.

11. Appeal is dismissed.

(MUKTA GUPTA)
JUDGE

JANUARY 29, 2013
'vn'

CRL.A. 14/2013

Page 10 of