

Net Ram Vs. State

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Court : Rajasthan Jodhpur

Decided On : Oct-18-2013

Appellant : Net Ram

Respondent : State

Advocate for Pet/Ap. : Shri. R.K.Charan

Judgement :

SB Criminal Appeal No.673/2008 Netram.

versus State of Rajasthan.

1 IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR.

∴

JUDGMENT

∴ S.B.Criminal Appeal No.673/2008 Netram.

versus State of Rajasthan Date of Judgment :: 18th October, 2013.

Hon'ble Mr.Justice Sandeep Mehta Mr.RK Charan, for the appellant.

Ms.Rajlaxmi, PP, for the respondent State.

Reportable ..The instant appeal has been preferred by the appellant Netram against the judgment dated 29.8.2008 passed by the learned Special Judge, NDPS Act Cases, Hanumangarh in Sessions Case No.56/2005 whereby he was convicted for the offence under Section 8/15(c) of the NDPS Act and was sentenced to undergo eleven years rigorous imprisonment and a fine of Rs.1,00,000/-.

In default of payment of fine, he was further directed to undergo two years & six months' simple imprisonment.

Succinctly stated, the facts of the case are that Mahendra Dutt PW8 posted as the S.H.O.at the P.S.Bhirani, was on patrolling duty on 11.10.2005.

He received an information at about 4:00 P.M.that the appellant was indulged in illegal trade of contraband poppy straw.

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2 informant reported that the appellant had concealed two bags of poppy straw in his house and was on the look out to sell the same.

The information was taken down in writing and a copy thereof was sent to the Circle Officer, Nohar.

Thereafter, the S.H.O.summoned two motbirs and proceeded to the house allegedly owned by the appellant in the Village Gandhi Badi.

It is said that a person was seen standing in front of the house.

On asking his name, he revealed his identity as Netram s/o Om Prakash r/o Gandhi Badi, the appellant herein.

He was informed about the source information and after taking his consent, the S.H.O.entered the house.

It is alleged that a room/store was seen on the terrace of the house.

The approach door of the terrace was locked.

The appellant allegedly provided the key of the lock.

Two jute bags full of some material were seen lying in the room.

The bags were opened and on tasting and smelling the material, it gave poppy straw like flavour.

The appellant could not show any license or permit etc. for being in possession of the contraband.

On the personal search of the accused being conducted, a live cartridge was found in his pocket.

The accused was arrested.

The gunny bags were weighed by a spring balance and each bag was found to be weighing 40 kgs.

including the weight of the packing material.

The S.H.O. thereafter mixed the contents of both the bags on the terrace and SB Criminal Appeal No.673/2008 Netram.

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3 collected two samples of 500 grams each from the admixture.

After taking out the samples, the contraband poppy straw was re-packed in the same bags and the samples as well as contraband were sealed.

On the basis of the recovery, an FIR No.181/05 for the offence under Section 8/15 of the NDPS Act was registered against the appellant and investigation commenced.

After completion of investigation, the police filed a charge sheet against the appellant for the aforesaid offence.

The trial Court framed charge against the appellant for the offence under Section 8/15 of the N.D.P.S.Act.

The appellant pleaded not guilty and claimed trial.

The prosecution examined nine witnesses in support of its case.

The appellant, in his statement under Section 313 Cr.P.C., denied the prosecution story.

The learned trial Judge at the conclusion of the trial proceeded to hold the appellant guilty of the offence under Section 8/15(c) of the NDPS Act and sentenced him as above.

Hence this appeal.

Shri R.K.Charan, learned counsel for the appellant, has limited his arguments to two points for challenging the impugned judgment.

He submitted that : (i)the procedure of sampling adopted by the S.H.O.was illegal, improper & impermissible and thus, the appellant's conviction is vitiated.

He submitted that the recovered material was found packed in two separate gunny bags SB Criminal Appeal No.673/2008 Netram.

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4 weighing 40 kgs.

each.

He contended that rather than taking out exclusive samples from each gunny bag, the seizure officer mixed the material packed in the two gunny bags and then collected the samples which were forwarded to the F.S.L.Learned counsel urged that by the procedure adopted, it would not be possible to arrive at a satisfaction that both the gunny bags contained contraband poppy straw.

He submitted that for the purpose of proving that the article packed in each of the gunny bags was poppy straw, the seizure officer was required to collect separate individual samples from each gunny bag and forward the same to the F.S.L. He submitted that failure to collect exclusive samples from both the gunny bags caused great deal of prejudice to the accused and he is entitled to claim that both the gunny bags were not having poppy straw.

In support of his submissions, learned counsel for the appellant placed reliance on the decision rendered by the Hon'ble Apex Court in the case of Union of India.

versus Bal Mukund and ORS. reported in 2009 Cri.L.J.2407 and on the decision rendered by this Court in the case of Ghewar Ram.

versus State of Rajasthan reported in 2007(2) Cr.L.R.(Raj.) 1695.

(ii) The second limb of his argument was regarding the house from where the recovery was effected not being in SB Criminal Appeal No.673/2008 Netram.

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5 the exclusive possession of the accused.

Learned counsel for the appellant submitted that the Investigating Officer PW9 Narendra, Circle Officer, admitted in his cross examination that the house from which the recovery was effected was jointly occupied by the accused, his parents, his brothers and sister.

He submitted that the prosecution has failed to prove that the recovery was effected from the premises in exclusive possession of the accused.

He thus submitted that the accused is entitled to acquittal because the prosecution could not prove that the recovery was effected from a place in the exclusive and conscious possession of the accused.

Thus, it was prayed that the appellant deserves to be acquitted in this case.

The learned Public Prosecutor on the other hand vehemently opposed the submissions advanced by the learned counsel for the appellant.

He contended that the Investigating Officer acted fairly in mixing the contraband packed in two gunny bags and thereafter in taking the samples.

He submitted that by adopting the said procedure, representative sample from whole of the seized material was collected and forwarded to F.S.L. and thus, no prejudice was caused to the accused.

He further submitted that the key of the room/store from which contraband was recovered was provided by the accused and thus, the SB Criminal Appeal No.673/2008 Netram.

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6 accused cannot claim that the place of recovery was not in his exclusive possession.

Thus, he submitted that the appeal deserves to be rejected.

Heard and considered the arguments advanced at the bar and perused the impugned judgment as well as the record of the case.

In my opinion, the appeal filed by the appellant can be decided on the fiRs.argument alone.

It is the admitted case as per the seizure memo Ex.P/1 and the testimony of the seizure officer PW8 Mahendra Dutt that two gunny bags weighing 40 kgs.

each were recovered from the store on the fiRs.floor of the house of the accused.

Though no procedure is prescribed either in the N.D.P.S.Act or in the N.D.P.S.Rules regarding the manner in which the samples are to be drawn but a Standing Instruction No.1/88 has been issued by the Narcotics Control Bureau, New Delhi in this regard.

Instruction 1.7 prescribes the manner in which the samples are to be drawn in each seizure case.

Instruction 1.7 reads as under :- 1.7 Number of samples to be drawn in each seizure case- a) In the case of seizure of a single package/container one sample in duplicate is to be drawn.

Normally it is advisable to draw one sample in duplicate from each packag/container in case of seizure of more than one SB Criminal Appeal No.673/2008 Netram.

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7 package/container.

b) However, when the package/containers seized together are of identical size and weight, bearing identical markings and the contents of each package give identical results on colour test by U.N.Kit, conclusively indicating that the packages are identical in all respect/ the packages/container may be carefully bunched in lots of 10 packages/containeRs.In case of seizure of Ganja and Hashish, the packages/containers may be bunched in lots of 40 such packages/containeRs.For each such lot of packages/containeRs.one sample in duplicate may be drawn.

(emphasis supplied) c) Whereafter making such lots, in the case of Hashine and Ganja, less than 20 packages/containers remain, and in case of other drugs less than 5 packages/containers remain, no bunching would be necessary and no samples need be drawn.

d) If it is 5 or more in case of other drugs and substances and 20 or more in case of Ganja and Hashish, one more sample in duplicate may be drawn for such remainder package/containeRs.e) While drawing one sample in duplicate from a particular lot, it must be ensured that representative drug in equal quantity is taken from each package/container of that lot and mixed together to make a composite whole from which the samples are drawn for that lot.

From a perusal of Instruction 1.7(a), it is evident that SB Criminal Appeal No.673/2008 Netram.

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8 it is advisable to draw one sample in duplicate from each package/container in case of seizure of more than one package/container.

Instruction 1.7(b) provides an exception to Instruction 1.7(a). It has been provided in Instruction 1.7 (b) that where the package/containers seized together are of identical size and weight, bearing identical markings and the contents of each package give identical results on colour test by U.N.Kit, conclusively indicating that the packages are identical in all respects then the packages/container may be carefully bunched in lots of 10 packages/containers. In case of seizure of Ganja and Hashish, the packages/containers may be bunched in lots of 40 such packages/containers. For each such lot of packages/containers, one sample in duplicate may be drawn.

Thus, in the aforesaid situations, a representative sample can be drawn after bunching together the contents of numerous packages.

The essential requirement before such an action of drawing a representative sample can be undertaken is that the contents of each package have to be subjected to colour test by U.N. drug testing Kit.

Once the test is conducted and the result indicates that all the packages are identical in all respects, then a representative sample can be taken out after bunching the packages.

Admittedly, in this case, no such colour test by U.N.Kit was conducted on the two packages/gunny bags by the seizure SB Criminal Appeal No.673/2008 Netram.

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9 officer before collecting the representative sample.

Hence, the Investigating Officer was under an obligation to collect separate samples from each of the gunny bags so that the analysis of the contents of each of the gunny bag could be performed individually.

As the seizure officer before drawing the samples, proceeded to mix the contents of the gunny bags without subjecting them to the test by the U.N.Kit, the accused has a right to contend that one of the gunny bags might not have contained contraband poppy straw.

If at all the prosecution desired to prove that both the gunny bags contained poppy straw, then it was essential for the samples to have been collected and analysed individually from both the gunny bags or else, the test by U.N.Kit should have been carried out on the material present in both the bags.

The Hon'ble Apex Court considered a similar issue in the case of Gaunter Edwin Kircher versus State of Goa reported in AIR 1993 SC1456 and observed as below:-
5.

we shall first consider whether the prosecution has established beyond all reasonable doubt that the accused had in his possession two pieces of Charas weighing 7 gms. and 5 gms. respectively.

As already mentioned only one piece was sent for chemical analysis and P.W.1 the Junior Scientific Officer who examined the same found it to contain Charas but it was less than 5 gms. from this SB Criminal Appeal No.673/2008 Netram.

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10 report alone it cannot be presumed or inferred that the substance in other piece weighing 7 gms. also contained Charas.

It has to be borne in mind that the act applies to certain narcotic drugs and psychotropic substances and not all other kinds of intoxicating substances.

In any event in the absence of positive proof that both the pieces recovered from the accused contained Charas only, it is not safe to hold that 12 gms. of Charas was recovered from the accused.

In view of the evidence of P.W.1 it must be held that the prosecution has proved positively that Charas weighing about 4.570 gMs.was recovered from the accused.

The failure to send the other piece has given rise to this inference.

We have to observe that to obviate this difficulty, the concerned authorities would do better if they send the entire quantity seized for chemical analysis so that there may not be any dispute of this nature regarding the quantity seized.

If it is not practicable in a given case, to send the entire quantity then sufficient quantity by way of samples from each of the packets of pieces recovered should be sent for chemical examination under a regular panchnama and as per the provisions of law.

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This Hon'ble Court also in the case of Ghewar Ram (supra) held that the procedure adopted by the seizure officer in mixing the articles contained in different bags and collecting a single sample from the same and having it analysed by the F.S.L., was defective and caused prejudice SB Criminal Appeal No.673/2008 Netram.

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11 to the accused.

In view of the aforesaid factual scenario, this Court is of the opinion that the highest case which the prosecution has been able to prove is that one of the bags seized by the seizure officer in this case contained poppy straw.

It cannot be held affirmatively that both the seized bags contained contraband poppy straw.

Each of the bag was allegedly weighing 40 kgs.

Thus, the accused at best can be held liable for being found in possession of 40 kgs.

of contraband poppy straw and nothing beyond that.

The act of the seizure officer in not drawing exclusive samples from both the gunny bags, entitles the accused to raise the issue regarding one of the bags not containing poppy straw and the argument has to be accepted.

In this view of the matter, this Court is of the opinion that the appellant's conviction as recorded by the learned trial judge under Section 8/15 of the NDPS Act for being found in possession of commercial quantity of poppy straw cannot be sustained and instead, the appellant deserves to be convicted for the offence under Section 8/15(b) of the NDPS Act for being found in possession of a non-commercial quantity i.e.40 kgs.

of poppy straw.

The appellant suffered some custodial period during investigation and at the trial and thereafter, he is in continuous custody from the date of his conviction.

Thus, he has suffered imprisonment well in SB Criminal Appeal No.673/2008 Netram.

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12 excess of five years As such, this Court is of the opinion that the sentence already suffered by the appellant till date shall serve the ends of justice.

As a result of the aforesaid discussion, the appeal succeeds in part.

The appellant's conviction for the offence under Section 8/15 of the N.D.P.S.Act as recorded by the learned Special Judge, NDPS Act Cases, Hanumangarh by the judgment dated 29.8.2008 is altered to the offence under Section 8/15(b) of the NDPS Act.

He is sentenced to the period already undergone by him.

The sentence of fine is reduced to Rs.5,000/- only.

On default of payment of fine, he shall further undergo one month's imprisonment.

The appellant is in custody.

He shall be set at liberty forthwith upon depositing the fine, if not wanted in any other case.

[Sandeep Mehta],J.

/S.Phophaliya/

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