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Court : Uttaranchal

Decided On : May-27-2013

Judge : Alok Singh

Appeal No. : Criminal Appeal No. 237 of 2010

Appellant : Nasir

Respondent : State of Uttarakhand

Advocate for Pet/Ap. : Mr. B.M. Pingal

Judgement :

Alok Singh, J (Oral)

Present appeal is directed against the judgment and order dated 01.09.2010 passed by 3rd Additional Sessions Judge, Udham Singh Nagar in Sessions Trial No. 21 of 2008 whereby appellant was found guilty for the offence punishable under Section 8/17 (C) of the NDPS Act and was sentenced to undergo 10 years rigorous imprisonment and to pay fine of Rs. 1,00,000/- and in default of making payment of fine, to undergo additional imprisonment of one year under Section 8/17 (C) of the NDPS Act.

Brief facts of the present case, inter alia, are that on 31.07.2007 SI Abdul Kalam with Constable Ravindra Singh, Constable Kuldeep Arya, SI Om Prakash Sharma (PW1), SI Vikas Kumar (PW2), Constable Firoz Khan (SOG) left the police station

vide report no. 26 at 10.10 p.m. for collecting the information about car lifters and suspects; when police party reached at Poolbhatta, police informer passed on secret information to PW3 SI Abdul Kalam that one person from Bareilly was carrying brown sugar while purchaser thereof was about to come; if police party immediately could reach on the spot, both of them could be apprehended; having received such secret information, police approached different members of public and requested them to become independent witnesses; however, none of them could agree to become independent witness; members of police party made search of each other and having satisfied that none of them was carrying any illegal thing, police party, by hiring a private vehicle, reached on the spot; private vehicle was sent back and thereafter, police party taking shelter of lyptus trees started proceedings towards the spot; police informer pointed out towards the appellant and left the places; appellant was apprehended at 1.00 p.m. and on being asked, appellant disclosed his identity and told the police party that he was carrying 600 gms of brown sugar; thereon appellant was made to understand his legal right that he could be searched in presence of a Magistrate or a Gazetted Officer; appellant replied to the police party, if police party wished, they could call anybody; on this SI Abdul Kalam requested the Circle Officer Pramod Kumar to come on the spot and narrated the entire incident to him; whereupon PW4 told PW3 that he was in Kichcha and would be reaching on the spot after some time; PW4 Circle Officer reached on the spot; PW4 made inquiry from the appellant, appellant admitted that he was carrying 600 gms of brown sugar and told PW4 that he was about to sell the brown sugar to one person of Haldwani, however, before he could deliver the same to the purchaser, he was apprehended; bag being carried by the appellant was opened and therefrom 600 gms of brown sugar was recovered; 25 gm brown sugar was taken out as sample; sample and contraband, so recovered, were kept in different seal covers under the seals and signatures of PW3; appellant along with contraband, so recovered and sample thereof were brought to the police station and thereafter, chick FIR was registered.

Sample was sent to the FSL, Dehradun for chemical examination through Constable Jitendra Singh under the order of 1st Additional Sessions Judge, Udham Singh Nagar on 21.08.2007, it was delivered to the FSL on 23.08.2007, as revealed from FSL report dated 16.02.2008.

Having investigated the matter, charge-sheet was submitted against the appellant for the offence punishable under Section 8/22 of the NDPS Act. Appellant was charged for the offence punishable under Section 8/22 of the NDPS Act. Appellant denied the charges and claimed trial.

To prove the prosecution story, PW1 Om Prakash Sharma, PW2 SI Vikas Kumar, PW3 SI Abdul Kalam, PW4 Circle Officer Pramod Kumar, PW5 Constable Vimal Singh, PW6 SI Hari Ram, PW7 Ravinder Kumar Kaushal, PW8 SI Vijaya, PW9 Subhash Chandra Tamta were examined and thereafter, statement of appellant was recorded under Section 313 Cr.P.C.

Having perused the entire material made available on record, learned trial court was pleased to pass the judgment and order impugned in the present appeal.

I have heard Mr. B.M. Pingal, learned counsel for the appellant and Mr. Prabhakar Joshi and Mr. K.S. Rangarh, Brief Holders for the State and have carefully perused the record.

In the present case, neither Maalkhana Register was produced nor Constable Jitendra Singh was produced in the witness box, who had allegedly taken the sample of brown sugar from police station to FSL, Dehradun. As per exhibit K9 sample was forwarded to FSL, Dehradun on 21.08.2007 while as per report of FSL dated 16.02.2008, it was handed over in the FSL on 23.08.2007, Constable Jitendra Singh would have been the best witness to depose that he, in fact, received the sample of brown sugar in an intact seal cover from Maalkhana and handed over the same in intact seal cover to FSL, Dehradun on 23.08.2007. He would have been better witness to explain that if vide order dated 21.08.2007 sample was handed over to him, as to why the same was handed over to FSL on 23.08.2007 and meanwhile, sample remained in intact position and there was no tempering with it during intervening period.

Honble Apex Court in the case of State of Rajasthan Vs. Gurmail Singh reported in 2005 (3) SCC 59 has observed that in absence of Maalkhana Register, it cannot be said that contraband and sample were kept in Maalkhana in intact position and there was no tempering with the contraband and sample.

In the absence of Maalkhana Register and due to non examination of Constable Jitendra Singh, prosecution failed to prove very very important link evidence.

As per the prosecution case, when police party was near Poolbhatta, a secret information was passed on to police party that someone was carrying brown sugar and other party was about to come to purchase it and if police party could reach on the spot, both of them could be apprehended; having apprehended the appellant, PW3 requested PW4 Circle Officer telephonically to come on the spot for the purpose of search and after some time PW4 could reach on the spot.

In the opinion of this Court, police party was having sufficient time to record the information, so received, in writing and pass it to the superior officers, as required under Section 42 (1) of the NDPS Act. Honble Apex Court in the case of Kishan Chand Vs. State of Haryana reported in 2013 (2) SCC 502, having considered the various judgments of Honble Apex Court, in paragraph 19 has observed as under:

19. The provisions like Section 42 or 50 of the Act are the provisions which require exact and definite compliance as opposed to the principle of substantial compliance. The Constitution Bench in the case of Karnail Singh (2009) 8 SCC 539 carved out an exception which is not founded on substantial compliance but is based upon delayed compliance duly explained by definite and reliable grounds.

As per dictum of Honble Apex Court, compliance of Sections 42, 50 of the NDPS is mandatory in nature. Substantial compliance shall not take place of actual compliance, however, delayed compliance duly explained by the definite and reliable grounds, in the peculiar facts and circumstances of the case, can be accepted. In the present case, neither there is actual compliance nor there is delayed compliance of Section 42 of the NDPS Act, therefore, benefit must be extended in favour of appellant.

Not only this, PW1 SI Om Prakash Sharma, in his cross examination, stated that neither the sample seal nor seal cover contain the signatures of Circle Officer. PW2 SI Vikas Kumar, in his cross examination, stated that police party having received the secret information reached on the spot in a private vehicle; he does not remember the number of private vehicle; he does not remember, who was

owner of that vehicle and whom was requested to provide that vehicle to go to the spot; PW2 further stated that he does not remember as to whether any freight was paid to the owner of the vehicle, which was used by the police party to reach on the spot to apprehend the appellant. During his cross examination, he further stated that he only knew that brown sugar was recovered from the possession of appellant and did not know what else was recovered on the personal search of the appellant.

Perusal of Exhibit Ka-1 seizure memo would reveal that firstly, copy of seizure memo was allegedly handed over to the appellant and thereafter, endorsement to the effect that recovery is made in my presence was made by the Circle Officer.

In normal course, such endorsement should have been made prior to signature of the accused receiving the copy of seizure memo. It seems that seizure memo was ante dated and was not prepared on the spot.

In view of the above discussion, in my considered view, prosecution has failed to prove the guilt of accused beyond reasonable doubt. Therefore, present appeal is allowed. Impugned judgment and order dated 01.09.2010 passed by 3rd Additional Sessions Judge / Special Judge, (NDPS Act) Udham Singh Nagar in Special Sessions Trial No. 21 of 2008 is hereby set aside. Appellant is acquitted from the charges levelled against him. Appellant is in jail. Let he be released forthwith, if not wanted in any other case.

Let a copy of this judgment be forwarded to the court below for compliance along with lower court record.

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