

Dinesh Das Vs. the State of Bihar

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Court : Patna

Decided On : Apr-24-2014

Judge : Aditya Kumar Trivedi

Appeal No. : Criminal Appeal (SJ) No. 238 of 2012

Appellant : Dinesh Das

Respondent : The State of Bihar

Judgement :

1. Appellant, Dinesh Das has been found guilty for an offence punishable under Sections 22(C) of the NDPS Act vide judgment dated 28.02.2012 and sentence to undergo RI for 10 years as well as fined of Rs. 1 Lac in default thereof, to undergo SI for two years vide order dated 29.02.2012 by 2nd Additional Sessions Judge-cum-Special Judge, West Champaran at Bettiah in Kangli P.S. Case No. 18/2010 has preferred this appeal.

2. Ganke Atwa, a SSB Constable filed a written report on 03.07.2010 before Officer-in-charge, Kangli P.S. alleging inter alia that on the same day at about 5.30 a.m., SSB Hawildar No. 9187147, Wamsi Atwa on getting confidential information, along with constable, Narendra Pd. Dewari, K. Pawalingam, Prashant Goswami, Tumo Kamdak came near Kangli railway halt at about 6:00 a.m. where they found one person standing west to road near tea stall of Jainuddin Mian in suspicious state and on account thereof, was apprehended. Local inhabitants were requested

to become seizure list witness but none came forward and on account thereof, Narendra Prasad Dewari, Tumo Kamdak, the constables became seizure list witnesses in whose presence there was personal search of the person so apprehended and found two packets pasted with thigh and three packets tied at waist with string carrying Charas. On query, apprehended person did not show any document. He further disclosed his identity as Dinesh Das, son of Ram Chandra Das of Village- Suryajahan, P.O. Raniganj, P.S, Pokharia, Distt- Parsa, Nepal and had further confessed that he was carrying the aforesaid Charas to Gorakhpur for sale. Accordingly, Kangli P.S. Case No. 18/2010 was registered, sample was sent to FSL, witnesses were examined and subsequently thereof, charge-sheet was submitted under Sections 20, 22, 23, 27(A), 29 of the NDPS Act and on account of which appellant was put on trial and ultimately met with his conviction and sentence, the subject matter of instant appeal.

3. The defence case as is evident from mode of cross-examination as well as statement recorded under Section 313 of the Cr.P.C. is of complete denial of occurrence as well as false implication on the ground of demanding his dues from the prosecution party as appellant was running a tea stall.

4. In order to substantiate its case, the prosecution has examined altogether 6 PWs out of whom PW-1 is Prashant Goswami, PW-2 is Narendra Prasad Dewari, PW-3 is Wangsi Atwa, PW-4 is Tumo Kamdak, PW-5 is K. Pualingam and PW-6 is Birendra Narain Singh. Prosecution had also exhibited Ext-1 series, signature of seizure list witness, Ext-2, proforma of seizure list bearing signature of accused/appellant, Ext-3, Written report, Ext-4 FSL report, Ext-5, Formal FIR. Defence had not examined any DW but during course of examination of PW-3, he had exhibited the paper as Ext-A on the basis of which PW-3 had deposed.

5. Learned counsel for the appellant as well as learned APP fairly submitted that right from inception of instant prosecution, the prosecution case is suffering from violation of so many mandatory provisions whereupon the judgment impugned would not survive. It has further been submitted that after going through judgment impugned, it gives an impression that either the trial court was not properly acknowledged with the relevant provisions of NDPS Act or acted in a mechanical

manner while inferring against appellant whereupon conviction and sentence has been recorded.

6. PW-3 is the informant who along with other Constable on getting information had gone to Kangli halt and intercepted the appellant who was standing in suspicious circumstance and from his possession, as is evident from consistent evidence of the PWs as well as from the judgment impugned itself, on search so made at Kangli Halt itself, 5 Kilograms of Charas was recovered and for that seizure list was prepared at the Kangli P.S. It is evident from the consistent evidence of PW-1, PW-5 that search and seizure was made by PW-3 along with others whose status at that very moment happened to be that of Sepoy. Section-42 falling under Chapter-5 of the NDPS Act authorizes the official concerned who must be above the rank of Sepoy competent to make search and seizure. For better appreciation Section-42 is incorporated below:-

42. Power of entry, search, seizure and arrest without warrant or authorization.

(1) Any such officer (being an officer superior in rank to a peon, sepoy or constable) of the departments of central excise, narcotics, customs, revenue intelligence or any other department of the Central Government or of the Border Security Force as is empowered in this behalf by general or special order by the Central Government, or any such officer (being an officer superior in rank to a peon, sepoy or constable) of the revenue, drugs control, excise, police or any other department of a State Government as is empowered in this behalf by general or special order of the State Government, if he has reason to believe from personal knowledge or information given by any person and taken down in writing, that any narcotic drug, or psychotropic substance, in respect of which an offence punishable under Chapter IV has been committed or any document or other article which may furnish evidence of the commission of such offence is kept or concealed in any building, conveyance or enclosed place, may, between sunrise and sunset,-

(a) enter into and search any such building, conveyance or place;

(b) in case of resistance, break open any door and remove any obstacle to such entry;

(c) seize such drug or substance and all materials used in the manufacture thereof and any other article and any animal or conveyance which he has reason to believe to be liable to confiscation under this Act and any document or other article which he has reason to believe may furnish evidence of the commission of any offence punishable under Chapter IV relating to such drug or substance; and

(d) detain and search, and, if he thinks proper, arrest any person whom he has reason to believe to have committed any offence punishable under Chapter IV relating to such drug or substance:

Provided that if such officer has reason to believe that a search warrant or authorization cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place at any time between sun set and sun rise after recording the grounds of his belief.

(2) Where an officer takes down any information in writing under sub-section (1) or records grounds for his belief under the proviso thereto, he shall forthwith send a copy thereof to his immediate official superior.

7. That means to say, right from inception of the instant prosecution, prosecution party was not at all competent authority to make search and seizure.

8. Now coming to the other aspect, it is also an admitted fact that appellant was searched physically and during course thereof, as alleged, 5 Kilograms of Charas was recovered. When there happens to be personal search then in that event, the NDPS Act attracts and cast an obligation upon the authority concerned towards the accused to have his personal search in presence of Gazetted Officer. Not only the FIR is silent on this score rather all the PWs during course of evidence also failed to disclose the same whether an option was offered to the appellant to have his personal search in presence of Gazetted Officer. For better appreciation Section-50 of the NDPS Act is incorporated below:-

50. Conditions under which search of persons shall be conducted.

(1) When any officer duly authorized under section 42 is about to search any person under the provisions of section 41, section 42 or sections 43, he shall, if such person so requires, take such person without unnecessary delay to the nearest Gazetted Officer of any of the departments mentioned in section 42 or to the nearest Magistrate.

(2) If such requisition is made, the officer may detain the person until he can bring him before the Gazetted Officer or the Magistrate referred to in sub-section (1).

(3) The Gazetted Officer or the Magistrate before whom any such person is brought shall, if he sees no reasonable ground for search, forthwith discharge the person but otherwise shall direct that search be made.

(4) No female shall be searched by anyone excepting a female.

9. As such, the mandate of law prescribing particular mode with regard to search and seizure as well as authority before whom search and seizure was to be carried out being a Gazetted Officer have been flouted and on account thereof, there happens to be another lapses on the part of the prosecution.

10. Now coming to the disclosure made by the prosecution, it is evident that after search and seizure appellant along with seized Charas were produced before Officer-in-charge of Kangli P.S. and then in that event, the subsequent procedure was to be carried out in terms of Section-55 of the NDPS Act. For better appreciation Section 55 of the NDPS Act is incorporated below:- 55. Police to take charge of articles seized and delivered. An officer-in-charge of a police station shall take charge of and keep in safe custody, pending the orders of the Magistrate, all articles seized under this Act within the local area of that police station and which may be delivered to him, and shall allow any officer who may accompany such articles to the police station or who may be deputed for the purpose, to affix his seal to such articles or to take samples of and from them and all samples so taken shall also be sealed with a seal of the officer-in-charge of the police station.

11. PWs-1 to 5 being SSB Constables have not spoken anything than producing the seized Charas along with appellant before PW-6 who after registering the case proceeded with investigation. He had not stated during his examination-in-chief that samples were prepared after taking out certain portion of Charas from the relevant packets and after having it sealed, got it examined by the FSL. Virtually, PW-6 kept mum over sampling. He even not cared to depose after production of five packets of Charas weighing 5 Kilograms whether it was kept in Maalkhana or some other place. Whether it was subject to destruction or not. Apart from the fact that material exhibit was not at all produced before the court nor the samples, if any, were also produced.

12. Not only this, it is also evident that neither the witnesses falling under PW-1 to PW-5 nor the Officer-in-charge, PW-6 had spoken with regard to compliance of Section 47(2) of the NDPS Act whereunder arrest of accused under the NDPS Act has to be reported to just superior officer within 72 hours.

13. Furthermore, the evidence more particularly, that of PW-6 failed to divulge compliance of Section 52 (A) of the NDPS Act which reads as follows:-

52A. Disposal of seized narcotic drugs and psychotropic substances.

(1) The Central Government may, having regard to the hazardous nature of any narcotic drugs or psychotropic substances, their vulnerability to theft, substitution, constraints of proper storage space or any other relevant considerations, by notification published in the Official Gazette, specify such narcotic drugs or psychotropic substances or class of narcotic drugs or class of psychotropic substances which shall, as soon as may be after their seizure, be disposed of by such officer and in such manner as that Government may, from time to time, determine after following the procedure hereinafter specified.

(2) Where any narcotic drug or psychotropic substance has been seized and forwarded to the officer-in-charge of the nearest police station or to the officer empowered under section 53, the officer referred to in sub-section (1) shall prepare an inventory of such narcotic drugs or psychotropic substances containing such details relating to their description, quality, quantity, mode of packing, marks,

numbers or such other identifying particulars of the narcotic drugs or psychotropic substances or the packing in which they are packed, country of origin and other particulars as the officer referred to in sub-section (1) may consider relevant to the identity of the narcotic drugs or psychotropic substances in any proceedings under this Act and make an application, to any Magistrate for the purpose of “

(a) certifying the correctness of the inventory so prepared; or

(b) taking, in the presence of such Magistrate, photographs of such drugs or substances and certifying such photographs as true; or

(c) allowing to draw representative samples of such drugs or substances, in the presence of such Magistrate and certifying the correctness of any list of samples so drawn.

(3) Where an application is made under sub-section (2), the Magistrate shall, as soon as may be, allow the application.

(4) Notwithstanding anything contained in the Indian Evidence Act, 1872 or the Code of Criminal Procedure, 1973, every court trying an offence under this Act, shall treat the inventory, the photographs of narcotic drugs or psychotropic substances and any list of samples drawn under sub-section (2) and certified by the Magistrate, as primary evidence in respect of such offence.]

That means to say none of the mandatory provision so prescribed and required to be followed to put safeguard upon false implication in the background of stringent mode of punishment have been followed by the prosecution.

14. In the case of Karnal Singh v. State of Haryana reported in 2009 CR.L.J. 4299 the Constitution Bench had concluded under para-17 as follows:-

œ17. In conclusion, what is to be noticed is Abdul Rashid did not require literal compliance with the requirements of Sections 42(1) and 42(2) nor did Sajan Abraham hold that the requirements of Section 42(1) and 42(2) need not be fulfilled at all. The effect of the two decisions was as follows:

(a) The officer on receiving the information (of the nature referred to in Sub-section (1) of section 42) from any person had to record it in writing in the concerned Register and forthwith send a copy to his immediate official superior, before proceeding to take action in terms of clauses (a) to (d) of section 42(1).

(b) But if the information was received when the officer was not in the police station, but while he was on the move either on patrol duty or otherwise, either by mobile phone, or other means, and the information calls for immediate action and any delay would have resulted in the goods or evidence being removed or destroyed, it would not be feasible or practical to take down in writing the information given to him, in such a situation, he could take action as per clauses (a) to (d) of section 42(1) and thereafter, as soon as it is practical, record the information in writing and forthwith inform the same to the official superior.

(c) In other words, the compliance with the requirements of Sections 42 (1) and 42(2) in regard to writing down the information received and sending a copy thereof to the superior officer, should normally precede the entry, search and seizure by the officer. But in special circumstances involving emergent situations, the recording of the information in writing and sending a copy thereof to the official superior may get postponed by a reasonable period, that is after the search, entry and seizure. The question is one of urgency and expediency.

(d) While total non-compliance of requirements of sub-sections (1) and (2) of section 42 is impermissible, delayed compliance with satisfactory explanation about the delay will be acceptable compliance of section 42. To illustrate, if any delay may result in the accused escaping or the goods or evidence being destroyed or removed, not recording in writing the information received, before initiating action, or non-sending a copy of such information to the official superior forthwith, may not be treated as violation of section 42. But if the information was received when the police officer was in the police station with sufficient time to take action, and if the police officer fails to record in writing the information received, or fails to send a copy thereof, to the official superior, then it will be a suspicious circumstance being a clear violation of section 42 of the Act. Similarly, where the police officer does not record the information at all, and does not inform

the official superior at all, then also it will be a clear violation of section 42 of the Act. Whether there is adequate or substantial compliance with section 42 or not is a question of fact to be decided in each case. The above position got strengthened with the amendment to section 42 by Act 9 of 2001.?

15. Thus, on account of violation of mandatory provision of law the propriety of judgment impugned melts down. Consequent thereupon, the same is set aside. Appeal is allowed.

16. Since appellant is in custody, he is directed to be released forthwith if not wanted in any other case.

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