

Munna Vs. the State and anr.

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Court : Allahabad

Decided On : Jul-19-2002

Reported in : 2002CriLJ4274

Judge : S.K. Agrawal and ;K.K. Misra, JJ.

Acts : [Narcotic Drugs and Psychotropic Substances Act, 1985](#) - Sections 8, 20(B)(2), 23, 35, 42, 42(1), 43, 50 and 57; Evidence Act - Sections 25 and 26

Appeal No. : Criminal Appeal No. 332 of 1996

Appellant : Munna

Respondent : The State and anr.

Advocate for Def. : D.G.A. and ;S.K. Singh, Adv.

Advocate for Pet/Ap. : Sanjiv Ratna, ;Ainakshi Sharma and ;Begum S. Kamal, Advs.

Disposition : Appeal allowed

Judgement :

K.K. Misra, J.

1. Present appeal is preferred against the judgment and order dated 12-4-1996 passed by Sri S.K. Ratoori 1st Additional District Judge, Siddharthnagar convicting

the sole appellant Munna under Section 20(b)(2) and Section 23 of Narcotic Drugs and Psychotropic Substances Act (in short N.D.P.S.) Act sentencing him with 15 years rigorous imprisonment and a fine of Rs. 1,00,000/- and further in default of payment of fine rigorous imprisonment for 2 years.

2. In brief the case of the prosecution is that on 17-10-1994 at about 6.30 p.m. Inspector Custom Sri B.K. Srivastava, Incharge Custom Station Khunwa, District Siddharth nagar, received an information that a person carrying Charas from Nepal shall be passing through this route. Consequently Sri B.K. Singh PW 1, complainant summoned two independent witnesses and took position near the Barrier to apprehended the culprit. At about 7.00 p. Jeep No. 5560 was seen coming from Nepal side and when it reached near the Barrier the Custom Officer stopped the Jeep for its checking. Accused appellant who was the sole occupant of the Jeep stopped the vehicle immediately. The Custom Officer in presence of the witnesses told the accused that search of this person and the Jeep is to be taken because there is information that charas is concealed in the cavity in his Jeep. He was also informed that if he so desires he could be taken before a Gazetted Officer for the search. At this the accused said that the Officer may himself take his search and there was no necessity to take him before any Gazetted Officer. The Officer along with witnesses on inspection of the Jeep were satisfied that the Jeep contained a Cavity. Subsequently the Jeep along with the accused was brought to the custom office and in the presence of witnesses the cursory search of the Jeep resulted in the discovery of a cavity and in this cavity charas was cleverly concealed became evident by its smell. The Officer immediately sent sepoy Sri Saghir Ahmad to Badhni with a request that superintendent custom Badhni may come immediately for the search of seized jeep which contained charas in its cavity. The Superintendent came from Badhni early in the morning at 7 a.m. next day and in his presence the search of the Jeep was conducted and charas concealed in the Cavity weighing 100 Kgs of the value of Rs. 10,00,000/-, was recovered. Samples were taken out, sealed in separate packets which contained signature of the accused witnesses and the officer and the remaining charas was duly sealed. Since recovery of charas was in violation of Section 8 of N.D.P.S. Act the Jeep containing the charas was also seized.

3. A Panchanama of the said recovery, interrogation and seizures were prepared at the spot which were signed by the accused, witnesses and the custom officer.
4. The prosecution has filed a criminal case No. 68 of 1994 Union of India through Mantra Prasad, Inspector Custom Khunwa, Siddharthnagar against the appellant.
5. According to the complaint statement of the accused recorded by him and the superintendent are voluntary statements. They are not hit by Sections 25 and 26 of the Evidence Act. They are clearly admissible in evidence.
6. In his voluntary statements recorded on 17/18-10-1994 17/18-10-1994 and 10-10-1994 the accused clearly admitted the time, the place and mode of recovery of the seized charas which was clearly concealed in the Jeep driven by him. The statements are Exs. Ka.2 and Ka.5 on the record.
7. After being satisfied the Customs Officer duly arrested the accused on 18-10-1994 and produced him before the competent Court. Throughout the night he was kept at the customs office. One of the packets of the sealed sample of this charas was sent to chemical examiner for analysis and a report from the chemical examiner was received along with the envelope in which the sample was sent to him. The report and the envelope were attached with the complaint and are Exts. Ka 3 and Ka 4. They are proved by PW 1. The report clearly establishes that the article recovered from the possession of the accused was charas.
8. The prosecution in Court has examined PW 1 Sri B.K. Srivastava Inspector, Customs Station Khunwa. PW 2 Mahendra Singh is Custom Superintendent Badhni who has come to the scene of occurrence on the next day to supervise the recovery. PW 3 Sita Ram alias Laddu is the witness of recovery. PW 4 Mantra Prasad is the Inspector Custom Khunwa. He was authorised by an order dated 10-11-1994 by his superior officer to conduct the investigation in the case and prosecute the accused.
9. We have heard Begam S. Kamal, learned counsel for the sole appellant and Sri S.K. Singh Addl. Standing Counsel, Union of India, for the opposite party.
10. The submission of the learned counsel for the appellant are as follows :-

1. The accused was not in conscious possession of the contraband concealed in the vehicle accompanied by the fact that source of information, has not been disclosed.

2. That there is non-compliance of Sections 42 and 43 of N.D.P.S. Act.

3. That the only so-called independent witness has not supported the prosecution case. It casts serious doubt in the recovery of the contraband.

4. Failure of investigation to make full report of all particulars to his immediate superior and non-compliance of procedure laid under Section 57 of the N.D.P.S. Act is fatal for the prosecution.

5. That no fair and proper option as required under Section 50 of the N.D.P.S. Act was given to the accused before taking his search.

11. We have carefully examined the statement of PW 1 who in his evidence in Court has stated that on 17-10-1994 at 6.30 p.m. he received information that a Jeep was to pass through the Khunwa check post and in that Jeep there is a cavity and in that cavity charas is expected. The sole occupant of the Jeep was the present appellant and after having come to know that there is a cavity and charas was likely to be concealed in the jeep PW 1 informed the appellant that he wanted to search the vehicle and if the appellant so desires he could be produced before a Gazetted Officer for the search of his person and his vehicle. The accused told PW 1 that he may-himself take the search and there was no necessity of taking him to any Gazetted Officer. The said vehicle was brought to custom office and an information was sent to the custom superintendent who came there in the morning of 18-10-1994 at about 7.00 a.m. When the superintendent of custom arrived there in his presence and in the presence of said Sita Ram alias Laddu and Juggan, the search was made and contraband article and the jeep were taken in possession by PW 1, Fard recovery was prepared. It is marked Ext. Ka. 1. He took the signatures of Juggan and Sita Ram on it and since the appellant could not sign his thumb mark was obtained. The Charas was duly seized which was 100 Kg. valued at Rs. 10,00,000/-. The charas was kept in the cavity in 21 bags. 4 samples were drawn and were duly sealed in separate

packets, Signatures of the accused and the witnesses were taken on these samples. One sample of charas was sent to chemical examiner for analysis and the report of the chemical examiner was received. The report of the chemical examiner is Ext. Ka. 4 on the record. It was proved by PW 1 B.K. Srivastava. In his complaint PW 1 has said that the recovered article was clandestinely smuggled from Nepal to India. He has not deposed in Court as to how it could be presumed that the appellant was possessing any conscious knowledge of the charas being kept in the cavity of the Jeep. He recorded the statement of the appellant on 17/18-10-1994. It is Ext. Ka. 2. The appellant has stated that he did not know anything regarding the charas. On 13-10-1994 when he met the owner of the vehicle he told the appellant that these are two persons, you take them to Kathmandu. On 16-10-1994 the persons whom the appellant was alleged to have taken to Kathmandu lodged the appellant in a Hotel on reaching there and disappeared with the jeep and when they returned in the night they told the appellant that they had to go back to Lucknow. He drove the jeep for Lucknow. They accompanied him up to Buthwal and at Buthwal both said that they will stay at Buthwal you better take the vehicle to its owner Mr. Shiv Prasad. Shiv Prasad the owner of the vehicle had employed the appellant just 15 days before the incident on a monthly salary of Rs. 1500/-. He owns a wood shop at Lucknow. The appellant in Ext. Ka. 2 had stated that he did not know anything about the cavity in the jeep and the article kept in its cavity.

12. It is pertinent to mention here that the fact that Shiv Prasad was the owner and the two persons who were alleged to be the acquaintance of Shiv Prasad were never interrogated by the Customs Investigating Officer. PW 1 has never cared to enquire about the veracity and truthfulness of the statement recorded by him i.e. Ext. Ka. 2. Regarding the conscious possession of the recovered charas by the appellant no evidence was brought on the record. PW 1 started preparation of the recovery memo on 17-10-1994 but it was completed on 18-10-1994. On 17-10-1994 he had not taken the signatures of any of the witnesses or the accused, when he concluded the recovery on 18-10-1994 the signatures of the witnesses, accused and the superintendent of custom were taken on the recovery memo. He did not remember how much of this statement was recorded by him on 17-10-1994 and what was recorded on 18-10-1994. This clearly means that no proceedings

were conducted on 17-10-1994. Evidence regarding 17-10-1994 to this end is per se false. It has also come in his statement that when jeep was intercepted the appellant immediately stopped it. He did not make any attempt whatsoever to flee the spot. He extended full cooperation. The accused was kept in the custody by PW 1 from 17-10-1994. He has further admitted in the statement that he received the information at about 6.30 pm. on 17-10-1994. This information was recorded by him, but in Court he did not produce its record. According to him it was not noted in any register. No such register is maintained. He further admitted that the said information which he had reduced in writing was taken by himself and its copy . was never sent to any higher official. Whatever information he had sent to senior officer he never got any information about its receipt from the higher authorities. He further stated that it was despatched by post but no evidence of its despatch was produced in Court. The contents of such information was neither proved nor even disclosed by this witness in Court in his evidence even.

13. The case was investigated by Mr. Mantra Prasad who was appointed by the Assistant Collector, Gorakhpur to investigate the case. It was admitted by him that he had detained the accused for more than 24 hours, but in cross examination it was put to him that how he came to know about the participation of the appellant in the abovenoted case, he said that since the accused was the driver of the vehicle which was having a cavity so on that basis he drew the conclusion that the appellant had knowledge about the Charas being kept in concealment in the vehicle. He further said that the driver was having Rs. 150/- in his pocket. In his cross examination he has admitted that one of the witnesses Sita Ram alias Laddu and Juggan appeared as witnesses of the department as in few other cases also. They were made the witnesses of recovery. The presumption therefore, follows that they are not independent. Juggan was not produced in Court and no reason for withholding the said witness was given by PW 4. PW 4 Sita Ram has a tea shop in the vicinity. Tea was supplied by him to the department.

14. P.W. 2 Mahendra Singh was the Custom Superintendent, Basti posted at Badhni. He after having received information from one constable Saheed reached the spot on 18-10-1994 at about 7.00 a.m. He stated that cavity of the jeep was opened in his presence and from this cavity Charas was recovered. 4 samples

were taken in separate sealed covers and on every sample signature of the appellant was also taken. He further stated that the statement of the accused was recorded. It was not written by him but was written by wireless operator Khunwa on his dictation. On this statement signature of accused Munna was obtained. On this statement signature of accused Munna was obtained. In his cross examination PW 2 has admitted that Saheed Sepoy had reported to him orally. He has further stated that the seized charas is not present in the Court when his statement was being recorded. The specimen was also not placed before the Court. He has not disclosed any reason as to why the statement of the accused was not recorded by him in his own hand and why no such endorsement was made over it. A suggestion was given to him by learned counsel for the defence that the appellant driver was illiterate and he had taken advantage of his illiteracy in involving him in this case. P.W. 3 Sita Ram alias Laddu is admittedly a pocket witness of the custom authorities as has been admitted by PW 1. His testimony cannot be relied upon so far as the recovery and interpretation of the jeep is concerned. He has admitted that by the side of the custom office he runs a tea shop. He used to supply tea to the officers there. On the date of incident he was provided food by the custom officer. He further stated that no charas was taken out from the cavity on 17-10-1994. Cavity was opened and again bolted. He stated in his cross examination that he does not know any thing about statement of accused being recorded by the superintendent:, but he has admitted that the recovery memo was signed by him. This witness being pocket witness of the custom officer having deposed in many cases as a recovery witness for the custom department and the fact that he owns a tea shop and the tea shop is situate near the custom office and that he used to supply tea to customs officials as well renders this witness's testimony highly unreliable. He was offered food by the customs authority and was kept in confinement there from 17th evening to 18th till recovery was made. So far as his evidence is concerned no confidence can be placed on his testimony and was rightly disbelieved by the trial Judge. He is not in any sense an independent witness. He was actually under the direct influence of customs authorities and since his winning of bread was dependent on this department he is fully amenable to their presence.

15. The last witness examined by the prosecution is PW 4 Mantra Prasad, Inspector custom, Khunwa. He stated that on 11-11-1994 he was handed over the investigation. He started the investigation on 12-11-1994. He had recorded the statement of PW 1, prepared the site plan. He proved it as Ext. Ka. 6. On 15-11-1994 he has recorded the statement of PW 3 Sita Ram alias Laddu and statement of Juggan who was not produced in Court. On 2-12-1994 he recorded the statement of Custom Superintendent Mahendra Singh and has also recorded the statement of Saghir Ahmad. He also recorded the statement of accused while he was in custody on 19-11-1994. After he concluded the investigation the complaint was filed in court. In his cross examination PW 4 has admitted the most crucial thing that during investigation he had not seen the recovered article i.e. charas. He further admitted that when he was making the statement in Court the seized article is not before him. When he was interrogated on the point as to why the statement of superintendent custom was taken so late he replied that no reasons for the same were disclosed by him in the C.D. The Investigating Officer has acted in a most cursory, casual and irresponsible manner and the act of the Investigating Officer is deplorable because he did not enquire from PW 1 B.K. Srivastava as to why he did not prepare any document himself. He did not even examine the said jeep which was carrying the recovered contraband. He did not verify the document of the vehicle. He did not even care to know as to how much fuel was in the tank of the vehicle. He did not initiate any action against the owner of the Jeep. He made no attempt to verify about the period the employment of the appellant and the veracity of the facts admitted by him in his statement. His failure to do so would certainly have bearing upon the conviction of the appellant.

16. After a careful examination of the statements adduced by the prosecution in Court it has become clear that so far as the participation of the accused in the offence is concerned PW 1 has admitted himself that since he was the sole occupant of the jeep in question therefore, he was convinced regarding his active participation in the above noted case. This fact is to be examined as has rightly been pointed out by the learned counsel for the appellant that the prosecution has to prove the conscious possession of the recovered contraband against the appellant either by cogent direct evidence or by circumstantial evidence. In the present case the prosecution has not examined the owner of the vehicle although

his address was given to the prosecution by the appellant. Further this accused had stated that he was employed by the owner just 15 days before the incident on a meagre salary of Rs. 1500/- per month. From the circumstances the possibility of his implication on the basis of suspicion in the case cannot be ruled out. The fact that he was having only Rs. 150/- in his pocket and his conduct at the time of incident in as much as he stopped the vehicle as soon as he was required to do so by the custom officer. He did not make any attempt to run away or in any other manner prevent the custom officer from making the search of his person and the vehicle. He readily followed the customs officer to his office. Moreover his ignorance regarding the recovered contraband article being concealed in his jeep are some circumstances which strongly confirm his plea of having no knowledge of either the existence of any cavity or concealment of charas therein. The Investigating Officer has also not cared to know about those two persons who had accompanied the appellant from Nepal to Buthwal and were entrusted to him by the owner of the seized vehicle, Failure of the Investigating Officer to interrogate the owner of the jeep in this connection further strengthens the presumption favourable to the appellant. Presence of a cavity in the jeep strongly establishes the complicity of the owner in the transport of the contraband narcotic substances to India from Nepal. It astonishes us as to why this simple equation did not occur to the customs official who investigated this case. It clearly shows that the custom officials were also hand in glove with these transporters of narcotic substances. This appellant probably was used as an scape goat for allowing a much larger consignment to pass through easily from the above check post immediately afterwards.

17. Learned counsel for the appellant in this regard placed, reliance on the decision reported in 2000 All Cri C 710 : 2000 Cri LJ 4635 : 2000 AIR SCW 3296 Karnail Singh v. State of Rajasthan. In para 11 of the said judgment the Apex Court has held that it is mandatory on the part of the prosecution to prove that accused was transporting the contraband with conscious mind and full knowledge. All ingredients of the offence for which he was convicted and sentenced were to be proved by the prosecution to the satisfaction of the Court.

18. In the present case failure to investigate the case against the owner of the vehicle further worsens the prosecution case. No explanation was tendered by the prosecution as to why the information on which the appellant was arrested was not forwarded to the higher authorities further damages its case beyond repair.

19. The counsel for the appellant has further placed reliance on the judgment of the Apex Court reported in 2000 SCC (Cri) 496 : 2000 Cri LJ 1384 : AIR 2000 SC 821 Abdul Rashid Ibrahim Mansuri v. State of Gujarat. The Apex Court has laid the emphasis on the compliance of requirements under Section 42 of N.D.P.S Act. It requires the officer making the recovery to take down in writing the information received and send a copy thereof to the immediate official superior to him. Non-compliance will affect the veracity of the prosecution case, because it is difficult to place any reliance on any unrecorded information merely on the basis of the statement of the witness. It would become suspect and will cause prejudice to the accused , it would further ipso facto vitiate the trial. In the instant case the information received by PW 4 was not recorded by him. The driver of the vehicle had admitted that two persons had accompanied him up to Buthwal and was asked by them to hand over the vehicle to the owner at Lucknow and none of these unknown persons who would have thrown proper light on the conveyance of the narcotic substance and bolstered the prosecution case against the appellant in spite of the name of the owner of the vehicle and his address of the shop being given by the accused why was the owner not interrogated by the prosecution is baffling us. In the absence of this we find it difficult to fasten the knowledge of the cavity and the concealment of the charas therein upon this appellant. His statements Exts. Ka 2 and Ka 5 both prove his lack of any such knowledge.

20. Learned counsel for the accused on the basis of the above facts has also placed reliance on the judgment of the Apex Court in Gurbux Singh v. State of Haryana reported in 2001 Cri LJ 1166 : AIR 2001 SC 1002. The Apex Court has held that failure of the Investigation Officer in making full report of all particulars to his immediate superior and to comply the provisions of Section 57 of the N.D.P.S. Act is a serious infirmity. In the present case no such compliance of Section 57 of the N.D.P.S. Act and Sections 42(1)(ii), 35 and 20(b)(ii) has been made by the prosecution. The only so called independent witness PW 3 is a pocket witness and

he is only witness of search and seizure made by the prosecution produced inspires no confidence in the testimony of PWs 1, 2 and 4 nor it furnishes any corroboration to their evidence.

21. We shall be failing in our duty if we do not observe that the manner in which the prosecution has investigated the case deserves our serious condemnation. The real and powerful person who acted from behind the curtain was not interrogated and a small fry like a driver (the appellant) having been unconscious of concealment of the contraband in the cavity or of the existence of the cavity was roped in because he was driving the vehicle. It is not in the evidence of PWs 1 and 4 that this accused pointed out to them the cavity. From his statements it is crystal clear that he was doing everything in good faith at the instance of his employer. It is a pity that the prosecution did not comply with the above said provisions of the Act. The acquittal in such cases is positively warranted where the conviction was based solely on the recovery and his presence in the jeep on the drivers seat cannot be held lawful. It is further to be added that the report of the Chemical Examiner proved as Ext. Ka. 4 also shows that the seal: of the sample could not be compared for want of facsimile of the seal. One more submission by the learned counsel for the appellant is that there is non-compliance of Section 50 of the N.D.P.S. Act. It is not available to her because when the seizure is made from the person of the accused only then she can make such a submission.

22. The need of a fair investigation in cases where law prescribes stringent punishment and also imposes too many limitations on the accused in more than one way, disallowing many defences to him on the ground that trade, conveyance or sale and possession of narcotic substance without a valid license is detrimental to the social health of the nation is a must. Young generation, adventurous and dissatisfied with prevalent disparities, non-availability of proper jobs is prone to fall a victim to such unscrupulous spinners of money. They are enemies of the nation. Such people are required to be dealt with strength and firmness. Fair investigation is the first step in this direction. If the investigation Officers are careless or slack in the discharge of this primary obligation this trade is likely to ruin the nation's morrow. No slackness or any collusion of these officers with the sharks in the drug peddling can therefore be borne or tolerated.

Conduct of PW 1, PW 3 and PW 4 in the circumstances needs serious scrutiny by the top custom authority. A copy of this judgment be sent to the Home Minister and Finance Minister Govt. of India for scrutiny and necessary action.

23. Consequently the appeal is allowed. The appellant is acquitted. The conviction and sentence passed by the learned trial Court is hereby set aside. The order dated 14-2-1996 passed by the learned 1st Addl. Sessions Judge, Siddharthnagar in S.T. No. 88 of 1994 is hereby set aside. This appellant is in jail. He shall be set at liberty forthwith.

24. A copy of this judgment shall be sent to the trial Court for passing necessary orders in this regard.

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