

Uoi Vs. Farid

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Court : Delhi

Decided On : Nov-02-2011

Judge : Suresh Kait, J.

Acts : Narcotics Drugs and Psychotropic Substance Act, 1985 - Section 21(c), 23(c) read with Section 28, 67; Customs Act - Section 102

Appeal No. : CRL.L.P. No.441 of 2011

Appellant : Uoi

Respondent : Farid

Judgement :

1. Petitioner has preferred the instant petition against the judgment dated 16.12.2010 passed by learned Additional Sessions Judge whereby respondent, who is a Afghanistan national, has been acquitted on the charges under Section 21(c) and 23(c) read with Section 28 of the Narcotics Drugs and Psychotropic Substance Act, 1985 (hereinafter referred to as 'NDPS Act').

2. In brief the facts of the case are that on 02.06.2007, respondent, who is holder of Afghanistan passport arrived at IGI Airport by KAM flight from Kabul. He was intercepted by Air Customs officer Akhilesh Kumar while walking out of the green channel. On making inquiry regarding any dutiable goods or any drug possessed by respondent, which he replied in negative; said Akhilesh Kumar called two independent witnesses besides Shri Timur Sarwar, Operational Manager of KAM

Air, who was well conversant in vernacular as well as Hindi and English. Pursuant to notices under Section 102 of Customs Act and Section 50 NDPS Act served upon respondent, he replied that Custom Officer could take his search and that of his baggage. During search, respondent was found to have a gray colour Velcro cloth belt on his waist concealed under the cloth worn by him. The belt was cut open and was found to contain four packets duly wrapped with yellow colour self-adhesive tape. On testing the substance, it turned out to be positive for heroin with field testing kit. All the four packets were given Sr. Nos.1 to 4 weighing 0.992KG, 1.004KG, 1.015KG and 1032KG respectively. The contents were emptied out in four light plythene bags of approx 6 gms each and total weight of the content was 3.963KG. Thereafter, four representative samples of 5gms each were separated and sealed with seal No.6 using a paper slip having date, signature of the persons present over there. The articles were seized and sealed and a panchnama was prepared. Samples and case property were deposited in the warehouse godown. Respondent made his statement under Section 67 NDPS Act. On 04.06.2007 samples were sent to CRCL; according to which, purity percentage of morphine was found to be 26.8% in Sample A-1; diacetylmorphine 5.8%, 5.6% and 8.5% in samples B1 to D1. On completion of investigation the complaint was filed before learned Trial Court.

3. Charge was framed against respondent under Section 21(c) and 21(c) read with Section 28 NDPS Act, to which he pleaded not guilty and claimed trial.

4. To substantiate its allegations against the respondent, twelve witnesses were examined by the Trial Court.

5. PW1 Shri Akhilesh Kumar was the Air Custom Officer, who intercepted the respondent at IGI Airport on the day of occurrence. He conducted the recovery and seizure proceedings. He had called Dr.Mohammad Faiyaz to explain the contents of the proceedings and documents to respondent in vernacular. This witness further proved the documents executed by him during the course of proceedings and narrated the whole incidence. He also identified the case property, when produced before him. He submitted the report under Section 57 NDPS Act to Superintendent Shri G. P. Singh.

6. PW2 Shri G. P. Singh was also Superintendent. The case property in sealed condition was produced before him who after checking made the entry Ex.PW1/J to Ex.PW1/J-4. He had also received the report under Section 57 NDPS Act Ex.PW1/M and authorized Mr.Raina vide letter Ex.PW2/A to carry the samples to CRCL.

7. PW3 Shri Jagdish Saran was the chemical examination CRCL. He proved his report Ex.PW3/A. He also identified the remnant samples Ex.P1 to Ex.P4.

8. PW4 Dr.Mehmood Faiyaz had deposed that on receipt of call from Mr.Anif reached the IGI Airport and met PW1. He explained the contents of the notice/documents and proceedings to respondent in vernacular and recorded statement of respondent in English which has been proved as Ex.PW1/G since respondent was illiterate person.

9. PW5 Shri R. K. Chawla had received the case property as deposited by PW1 and made the DR No.42021 to 42024 and proved the entries as Ex.PW5/A. He handed over the charge to Shri R. K. Khasa and made the charge entry.

10. PW6 Shri R. K. Raina had taken the samples to CRCL.

11. PW7 Shri Jaiveer Singh was the lab Assistant. He issued the receipt Ex.PW7/A to PW6 after getting the samples in intact condition.

12. PW8 Inspector Manoj Kumar had received the charge from SDO(A) Mr.Raina.

13. PW9 Shri S. L. Rana had taken the charge of the case property on 03.06.2007.

14. PW10 Shri A. K. Khasa had taken the charge of SDO (Arrival) from Shri R. K. Chawla and then handed over the charge to Sh.C. L. Rana, his incumbent.

15. PW11 Shri Petrus Kiro was posted in disposal branch of IGI Branch valuable godown. He received the packets from Mr.Manoj Kumar ACO with seals intact.

16. PW12 Bijender Singh had received the case property from PW1 and made the relevant entry.

17. Upon conclusion of trial and hearing arguments from both side, learned Trial Judge has passed the impugned judgment while holding that during evidence some variation in colour in the case property and sample was highlighted. Re-testing was ordered vide order dated 23.09.2009. Fresh samples were drawn. As per the latest report dated 19.11.2009 the samples gave presence of diacetylmorphine with their purity 20.7, 15.4, 15.6, & 17.4% respectively which on comparison with previous report dated 09.08.2007.

18. Further, in earlier report, sample A-1 gave positive for morphine but fresh samples A-1 gave presence of diacetylmorphine. It is not understood how the substance converted from morphine into diacetylmorphine. Generally, the purity percentage goes down with the passage of time but in the instant case, surprisingly the purity percentage went high and some chemical changes occurred which leads to an inference that samples sent to the laboratory were not the true representative samples. It was observed that content of diacetylmorphine cannot increase with the passage of time but can decrease. The subsequent report of CRCL raised a legitimate doubt about the substance which was allegedly recovered from respondent. Reliance was placed by the learned Trial Court on *Rahul Saini v. State* 2006 JCC Narcotics 134.

19. Learned Trial Court observed that the burden of proving everything essential to establishment of charge against the respondent always rest on the prosecution, as everyman is presumed to be innocent until the contrary is proved, and criminality is never to be presumed subject to statutory exception.

20. In connection with the Section 35 and 54 of the NDPS Act, learned Trial Court held that, no doubt, raise presumptions with regard to the culpable mental state on the part of the accused as also place burden of proof in this behalf on the accused; but a bare perusal of the aid provision would clearly show that presumption would operate in the trial of the accused only in the event, the circumstances contained therein are fully satisfied.

21. It is recorded by the Trial Court that the initial burden exists upon the prosecution and only when it stands satisfied, the legal burden would shift. Even then the standard of proof required for the respondent to prove his innocence is

not as high as that of the prosecution.

22. It is further recorded, if the prosecution fails to prove the foundational facts so as to attract the rigors of Section 35 of the Act, the actus reus which possession of contraband by the respondent cannot be said to have been established.

23. Further learned trial Court has held that the prosecution has failed to prove its case against the respondent beyond reasonable doubt.

24. Learned Trial Court placed reliance on State of Punjab v. Baldev Singh (1999) 3 SCC 977 wherein it was held that "It must be borne in mind that severe the punishment, greater has to be taken care to see that the safeguards provided in a statute are scrupulously followed." Same was held in Ritesh Chakarwarty v. State of M.P. 2006 (3) JCC Narcotics 150 Noor Aga v. State of Punjab 2008 VII AD (SC) 435 that the procedural requirements laid down are required to be strictly complied with.

25. Additionally, learned Trial Court had also relied upon Sharad Birdhichand Sarda v. State of Maharashtra (1984) 4 SCC 116 it was held : "We can fully understand that though the case superficially viewed bears as ugly look so as to prima facie shock the conscience of any court yet suspicion, however great it may, cannot take place of legal proof. A moral conviction however strong or genuine cannot amount to a legal conviction supportable in law. It may be recalled that the well established rule of criminal justice is that 'fouler the crime higher the proof'."

26. On the basis of the above findings, vide impugned judgment dated 16.12.2010, learned Trial Court acquitted the respondent from the case.

27. I note that the prosecution had argued in Rahul Saini (supra) that even by taking purity percentage of diacetylmorphine (heroin) of 19.4% into consideration, the purity weight of contraband substance recovered from the respondent would still be a commercial quantity, as is also argued in the present case, however, this argument of the prosecution was discarded by the Court in view of the doubts having been raised about the identity of the contraband substance recovered from the respondent and tested vide the said reports.

28. I further note that learned Trial Court has considered all pleas taken by petitioner however, the Trial Court notwithstanding the bars and restrictions contained in Section 37 of the NDPS Act, as in the instant case also there is a huge difference, between two test reports regarding the percentage of diacetylmorphine (heroin) and the first test report and the second test report, learned Trial Court found serious doubts regarding the substance recovered from the respondent and that tested in CRCL.

29. Vide a letter dated 09.09.2011 issued from the Director (Revenue Laboratories), CRCL to Shri R. K. Sharma, Additional Director General, (Directorate of Revenue Intelligence), Delhi Zonal Unit, Lodhi Road, New Delhi and have given the following observations:-

"1) There are no guidelines of CRCL functions for second test in respect of the narcotic drugs. 2) a) Illicit seized NDPS materials of natural, semi-synthetic in origin i.e. Opium, Charas, Ganja and Heroin etc non-homogeneous in nature, hence, if re-sampled, sample variation in contents of active substances can occur.

b) If re-sampling is done after a gap of considerable duration, then great variation in percentage of active content may occur, which could be due to the following reasons:

i) Improper storage(Deterioration due to effect of light, variation in temperature and humidity etc.)

ii) Natural products are prone to get infected with bacterial and fungal micro-organisam, which may cause a change in chemical composition, thereby it may decompose, partly or fully."

30. As per the literature "Studies on the degradation of heroin" from Forensic Science International 67 (1994) 147- 154, which reads as under:-

"Studies on the degradation of heroin" The question of the possible change in the heroin content of a given sample of putative heroin- containing brown powder, from chemical de- gradation of its di-acetyl morphine content, frequently arises whilst giving testimony in courts in cases involving heroin in Sri Lanka. Sample

Initial heroin	End of week 1	End of week 2	End of week 3	End of week 4	End of week 5	End of week 6	End of week 7	End of week 8	End of week 9	End of week 10	Average
87.2	87.2	87.2	87.2	87.2	87.2	87.2	87.2	87.2	87.2	87.2	87.2
21.6	5.4	3.2	2.3	0.7	98.4	03	44.7	30.3	13.4	9.4	6.2
3.8	91.5	04	33.1	26.6	18.4	15.2	12.8	8.2	75.2	05	47.5
20.2	3.4	2.1	1.2	0.3	99.4	06	53.3	15.5	4.7	3.4	2.0
0.0	100.0	07	32.1	25.9	14.1	8.5	6.4	4.2	86.9	08	55.3
51.2	32.2	22.3	16.8	10.3	81.4	09	55.7	26.3	7.4	4.3	1.1
0.0	100.0	10	35.5	28.3	19.5	15.2	11.8	9.4	73.5	Average	44.6
27.3	13.2	9.3	6.7	4.1	90.8	Discussion					

The analytical results showed that for methanolic O

solutions at ambient temperatures (26 C) the degradation of heroin during the 5-week period resulted in an average decrease in its heroin content by 90.8 %. Complete degradation of the heroin content of all samples was observed at the end of the eighth week, while the heroin contents of four samples were completely degraded at the end of the seventh week, four at the end of sixth week and two samples at the end of fifth week.

Under refrigerated conditions (6-8 OC), the degradation of heroin during the 5-week period resulted in an average decrease in its heroin content by 69.7%.

CONCLUSION

This means that the significance of the present work is enhanced in the numerous cases where 'seizures' involve small quantities of heroin. The reason being that the quantity of heroin contained in a sample analysed after several weeks would be appreciated less than was present at the time of seizure, and might well result in a significantly reduced penalty."

31. The issue of change of colour or purity has already been dealt in catena of cases as discussed above. Purity in percentage may be due to some other factors like lapse of time and place of storage etc. but the variation in the present case is tremendous and same cannot be explained by mere passage of time. Additionally, the doubt is with regard to the substance which was actually recovered from the respondent and tested subsequently, particularly sample A-1.

32. In view of above discussion, I find no discrepancy in the impugned judgment passed by the Trial Court.

33. Accordingly, Criminal L. P. No.441/2011 is hereby dismissed.

34. No order as to costs.

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