

Munnu Khan Vs. State

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Court : Delhi

Decided On : May-07-2013

Judge : Mukta Gupta

Appellant : Munnu Khan

Respondent : State

Advocate for Def. : Mr. Manoj Ohri

Advocate for Pet/Ap. : Mr. Anish Dhingra

Judgement :

R-3# \$ * IN THE HIGH COURT OF DELHI AT NEW DELHI + % CRL.A. 647/2003
Decided on:

07. h May, 2013 MUNNU KHAN Through: Appellant Mr. Anish Dhingra, Advocate with Appellant in person. versus STATE Through: Respondent Mr. Manoj Ohri, APP for the State CORAM: HON'BLE MS. JUSTICE MUKTA GUPTA MUKTA GUPTA, J (ORAL) CrI. M.A. No. 5710/2008 By this application the Appellant has sought sending the alleged substance, that is, charas allegedly recovered from him to the CFSL for finding out the percentage of contraband present in the alleged article seized. The Appellant is apparently seeking recourse to the judgment of this Court in Ansar Ahmad vs. State of Delhi, 2005 (3) JCC Narcotics 193 wherein this Court had directed that the percentage purity in the case of recovery of heroine should be ascertained. The Division Bench of this

Court in Dilip vs. State, 2011 Cri. L.J 33.has already held that in case of recovery of charas, the percentage of Tetra Hydro Cannabinol is immaterial as charas is a resin in whatever form whether crude or purified, obtained from the cannabis plant. Thus this application is devoid of any merit and is dismissed. CRL.A. 647/2003 1. By the present appeal the Appellant impugns the judgment dated 10th September, 2003 whereby he has been convicted for offence under Section 20 NDPS Act and the order on sentence dated 12th September, 2003 directing him to undergo Rigorous Imprisonment for a period of ten years and to pay a fine to Rs. 1 lakh and in default of payment of fine to further undergo Rigorous Imprisonment for a period of thirty months.

2. Learned counsel for the Appellant contends that no public witness was associated with the search though the Appellant was apprehended after he alighted from the bus near the bus stop where lot of public was present. Not only was there a market but even employees of metro were present besides people being present on the DTC bus stop. Despite prior information, the raiding party did not even carry the scales and the scales were taken from a nearby rehriwala. Legal requirement of notice under Section 50 NDPS Act has also not been complied with as no legal right of being searched by a Gazetted Officer or a Metropolitan Magistrate was explained. Section 42 NDPS Act has not been complied with. The explanation of the Appellant rendered under Section 313 Cr.P.C. was that he was a fruit seller and on the day of occurrence he was going in a rickshaw. At Shastri Park Red Light a scooter struck against the stationary rickshaw and the Appellant fell down on the rickshaw puller. The Appellant asked the scooterist to drive the scooter carefully however, he grappled with him. Later he found that they were police officers in civil dress and thus they took him to the police station and foisted this false case on him. This explanation has not been considered 3. Learned APP for the State on the other hand contends that Section 50 NDPS Act was not required to be complied with in the present case. The recovery was not made from the personal search of the Appellant but from the polythene bag in his hand. PW9 Inspector Hem Chand has stated that the information was noted in writing and the same must have been informed in routine to the senior officers. Efforts were made to join the public witnesses however, since none came forward the Appellant was apprehended as no further time could

be wasted in associating public witnesses. For the immediate requirement, taking the scales from the nearby rehriwala is not prohibited. Hence the appeal be dismissed.

4. I have heard learned counsel for the parties.

5. Briefly the case of the prosecution is that on 28th May, 2001 an information was received that one person would come with charas in a bus which would pass through Shastri Park. A raiding team was constituted and at about 8.15 p.m. the raiding team arrived at DTC Bust Stop Welcome, G.T. Road, Delhi. Four-five persons were asked to join the raiding party but they declined. The Appellant alighted from the bus with a polythene bag in his hand. On pointing out by the informer, the Appellant was apprehended. Notice under Section 50 NDPS Act Ex. PW3/A was served on him wherein he refused to avail the opportunity. The refusal was recorded vide Ex. PW3/B. On checking the white colour polythene, it was found containing green coloured polythene found containing 3 packets of charas. The SHO and ACP were called. On weighing, the entire quantity was found to be of 1.700 kgs. Out of the said contraband 100 grams was taken as sample. The sample and the remaining charas were separately put in pullandas and sealed with the seals of NM, that is of ASI Niaz Mehndi. Form CFSL was also filled in the spot and the SHO also put his seal on the pullandas and the form CFSL. PW3 ASI Niaz Mehndi prepared the ruqqa Ex. PW3/D which was sent to Police Station for getting the FIR registered. The case property, sample, CFSL form and the copy of the memo were handed over to the SHO. PW9 Inspector Hem Chand also reiterated the version of PW3 ASI Niaz Mehndi, the Investigating Officer. He further stated that he received both the parcels sealed with the seal of NM belonging to ASI Niaz Mehndi and he further sealed them with the seal of HC belonging to him. Form CFSL was also filled in and on arrival at the police station he deposited the form, the case property and sample with the MHCM.

6. A perusal of the testimony of the witnesses shows that the link evidence has been duly proved. After the sealing of the case property the sample and form CFSL were duly deposited with PW2 HC Rajinder Kumar who was working as MHCM at Police Station Welcome. On 3rd July, 2001, this witness sent the sample

parcel along with Form CFSL to FSL, Malviya Nagar through Constable Ghan Sham. PW2 HC Rajinder Kumar stated that as long as the parcels and the samples remained in his custody they remained intact. The only cross-examination of PW2 is that Ex. PW2/A, that is, entry made at serial 1208 in the Register 19 does not mention the time of deposit of the case property. Further PW7 Constable Ghan Sham who took the sample to the FSL Malviya Nagar on 3rd July, 2001 also deposed that on 3rd July, 2001 he took the sealed parcels duly sealed with the seals of NM and HC and deposited the same with FSL, Malviya Nagar vide RC No. 122/21. This witness was cross-examined by the learned APP and in the cross-examination he stated that he had taken the FSL form with the sample duly sealed and deposited the same. This version is further verified by the statement of PW10 S.K. Singla, Senior Scientific Assistant, CFSL who was then working at FSL Malviya Nagar. He stated that when the sample was handed over to him it was bearing seals of HC and NM along with forwarding letter. He found the seals intact. This witness has not been cross-examined thus the testimony of this Court witness has gone unchallenged.

7. The contention of the learned counsel for the Appellant that Section 50 NDPS Act has not been complied with in as much as the legal right to search before the Gazette Officer or Metropolitan Magistrate has not been informed deserves to be rejected. In the present case the contraband was not recovered from the personal search but from the polythene in the hand of the Appellant. Thus compliance of Section 50 NDPS Act was not mandatory. Similarly the contraband in the present case was recovered from the open space, that is, near the bus stand and thus even Section 42 NDPS Act had no application to the facts of the case.

8. There is no doubt that association of public witness lends credence to the prosecution case however, the testimony of police witness cannot be thrown out merely because public witness were not forthcoming to join the investigation. PW3, ASI Niaz Mehndi has stated that four-five public persons were requested to join the raid however, they refused to do so and thus the raid was conducted. This witness further clarified that there was no market nearby the place of occurrence and there was only a residential area. Since the bus from which the Appellant alighted, arrived within fifteen minutes thus without wasting time in joining public

witnesses the Appellant was apprehended on the pointing out by the secret informer.

9. In view of the aforesaid discussion I find no illegality in the impugned judgment convicting the Appellant for offence under Section 20 of the NDPS Act. This now brings me to the issue of sentence. The Appellant has been awarded the minimum sentence of ten years and fine of Rs. 1 lakhs. However, in default of payment of fine he has been directed to undergo Rigorous Imprisonment for a period of 2 years. The Honble Supreme Court in *Shahejadh Khan Mahebub Khan Pathan v. State of Gujarat*, (2013) 1 SCC 57, as regard the sentence in default of payment of fine held that a person cannot be penalized for not depositing the amount of fine and excessive and harsh punishment should not be awarded in default of payment of fine. No person can be put at disadvantageous position for his penury condition.

10. In view of the legal position and the fact that the sentence in default of payment of fine is on the higher side, I deem it fit to modify the same. Thus while maintaining the order on sentence to the extent that the Appellant has to undergo Rigorous Imprisonment for a period of ten years and to pay a fine of Rs. 1 lakhs, the sentence in default of payment of fine is modified to Rigorous Imprisonment for a period of six months.

11. Appeal is disposed of.

12. Bail bond and the surety bond are cancelled.

13. Learned counsel for the Appellant states that the Appellant is a prime witness in a dowry death case under Section 304B IPC where he is under cross-examination before the learned Additional Sessions Judge at Aligarh. In view of this fact the Appellant is directed to surrender to custody within four weeks from today. (MUKTA GUPTA) JUDGE MAY 07.2013 vn

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