A.F.R.

Reserved

Court No. - 76

Case :- CRIMINAL APPEAL No. - 757 of 2018

Appellant :- Jose Luis Quintanilla Sacristan
Respondent :- State of U.P.
Counsel for Appellant :- Manu Sharma,Dinesh Kumar Pandey,Mohd. Kalim,Rajeev Kumar
Counsel for Respondent :- G.A.

Hon'ble Ajai Tyagi,J.

1. This appeal has been preferred by the appellant-Jose Luis Quintanilla Sacristan against the judgment and order dated 30.10.2017, passed by learned Additional Sessions Judge, Fast Track Court-I, Maharajganj, in Special Case No.16 of 2015, arising out of Case Crime No.86 of 2015, Police Station-*Sonauli,* District-*Maharajganj* convicting and sentencing the appellant for ten years R.I. and Rs.1,00,000/- fine (in default, imprisonment for six months) under Section 8 read with section 20 (b) (ii) (C) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (herein after referred to as 'NDPS Act, 1985'), and for ten years R.I. and fine of Rs.1,00,000/- (in default, imprisonment of six months) under Section 8 read with Section 23 (C) of NDPS Act, 1985.

2. The relevant facts for disposal of this appeal are that on 15.2.2015, Sub Inspector-Ram Saran Yadav with Police Personnel of Police Station-Sonauli, Maharajganj and Sub Inspector-Raja Murad Ali of Seema Suraksha Bal (SSB) were on checking at India Gate situates at Indo-Nepal Border. They were jointly checking the people and vehicles. At about 14:10, a foreigner was seen by them taking a trolley-bag with him coming

from the 'No Man's Land' after crossing the Nepal border. Police Personnel stopped him and started checking his bag, which the foreigner tried to avoid, but when his trolley-bag was opened and checked, 10 kg. of *charas* was recovered from the bag in a plastic packet. On asking the foreigner, he told that he is Spanish and his name is Jose Luis Quintanilla Sacristan (the appellant) R/o Village-Street Dolores Lbarrliri No.5 ZA 33401 Aviles Astlirias Spain. The S.I. of S.S.B. Raja Murad Ali gave option to the accused-appellant speaking in English that if he desires so his search can be taken before any Gazetted Officer. On this option, he refused to opt and said that police personnel may take his personal search for which he gave his consent also in writing. First of all, police personnel took personal search of each other and after that accused was searched. Recovered *charas* was weighed by electrical weighing machine and weight of recovered *charas* was found to be 10 kg. out of which 100 gm. of *charas* was separated as sample and after sealing it properly, it was sent to Forensic Science Laboratory, Varanasi, for chemical examination and rest of the substance was sealed separately. At the time of arrest of the accused and recovery of *charas,* public was there, but nobody was ready to become public witness. Information of arrest of the accused-appellant was given to her sister-Lushia Cutena in Spain on her Mobile No.0034985565980 and recovery-memo was prepared on the spot and the case under Section 8/20/23 NDPS Act, 1985, was registered against the accused-appellant at P.S.-Sonauli, District-Maharajganj.

3. Heard Ms.Mary Punch, learned Advocate, assisted by Mr.Mohd. Kalim, Shri Rajeev Kumar, learned Amicus Curie, Mr.B.A. Khan, learned AGA appearing on behalf of the State and perused the record.

4. Learned counsel for the appellant, first of all, argued that in this case first information report is delayed, but it is not explained that how it was delayed. On perusal of chick-FIR, it is clear that accused was arrested on 15.2.2015 at 14:10 and on the same day, FIR was lodged at 16:45, i.e., after two and a half hour of the orrurrence. After arresting the accused, recovery-memo was prepared on the spot and accused was brought to the police station, which was three km. north from the place of occurrence. Hence, there is no delay in lodging the first information report against the appellant.

5. Learned counsel for the appellant further submits that accused is a spanish-national, he does not know Hindi while consent letter is written in Hindi and it is clear that accused was unable to understand the language and the matter of consent letter. In fact, police had taken the signature of the accused on blank-paper and after that matter was written on that showing the consent of the accused. It has also been submitted that no member of the police-party knew the Spanish-language, therefore, it was impossible for them to explain anything to the accused regarding his search, arrest etc. It is also not in the prosecution case that police-party was having a translator with them, who could translate the language to the accused-appellant.

6. *Per contra*, learned AGA submitted that prosecution witnesses have clearly stated in their statement that they explained entire proceedings to the accused in English-language, which was being very-well understood by the appellant. Hence, there was no language barrier.

7. In this regard, perusal of recovery-memo (Ex.ka3) shows that the matter of arrest and recovery was explained to accused-

appellant in English-language. S.I.-Ram Saran Yadav (PW2) has said in his statement that when the police-party came to know about *charas,* S.I.-Raja Murad Ali from S.S.B. (PW3) talked with the accused in English-language and also said in his statement that he made the accused understood all the things in English-language. It is not denied by the defence that accused did not understand the English-language. Hence, this Court is of the considered view that there was no language barrier between the police-party and the accused-appellant and it cannot be believed that accused did not understand what proceedings were going on against him and what was recovered from his possession. Therefore, the argument of learned counsel for the appellant regarding language-barrier is not sustainable.

8. Learned counsel for the appellant also argued that in this case, there was no compliance of Section 50 of NDPS Act, 1985, inasmuch as the offer given to the accused-appellant for searching in presence of a gazetted officer and he declined the offer and the same was not corroborated by any independent witness. Learned counsel submitted that before searching the belongings of the accused, he was not given option to be searched before a Gazetted Officer or a Magistrate.

9. As far as the compliance of Section 50 of the Act, 1985, is concerned, it would be relevant to quote Section 50 of the Act for ready reference:

> *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 section 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. 1[(5) When an officer duly authorized under section 42 has reason to believe that it is not possible to take the person to be searched to the nearest Gazetted Officer or Magistrate without the possibility of the person to be searched parting with possession of any narcotic drug or psychotropic substance, or controlled substance or article or document, he may, instead of taking such person to the nearest Gazetted Officer or Magistrate, proceed to search the person as provided under section 100 of the Code of Criminal Procedure, 1973 (2 of 1974).

(6) After a search is conducted under sub-section (5), the officer shall record the reasons for such belief which necessitated such search and within seventy-two hours send a copy thereof to his immediate official superior.]

10. The Hon'ble Apex Court in ***State of Punjab vs. Baldev Singh*** (1999) 6 SCC 172, held as under:

"12. On its plain reading, Section 50 of the Act, would come into play only in the case of a search of a person as distinguished from search of any premises etc. However, if the empowered officer without any prior information as contemplated by Section 42 of the Act makes a search or causes arrest of a person during the normal course of investigation into an offence or suspected offence and on completion of that search contraband under the NDPS Act, is also recovered, the requirements of Section 50 of the Act are not attracted."

11. Apart from this, it has also been held by Hon'ble Apex Court that the provision of Section 50 of the Act stands attracted in case of personal search and not in the case where the search was given effect otherwise than from the personal search of the accused. Following cases were relied:

1. Madan Lal and another vs. State of Himachal Pradesh, 2003 (47) ACC 763;

2. Megh Singh vs. State of Punjab, 2003 Cr.LJ 4329; and

3. State of Himachal Pradesh vs. Pawan Kumar, 2005 (52) ACC 710.

12. In the aforesaid judgments, it has been held by the Hon'ble Apex Court that Section 50 of the Act, 1985, applies only in case of personal search of a person. It does not extend to search of a vehicle or container or a bag or premises.

13. In this case, recovery-memo shows that 10 kg. *charas* was recovered from the trolley-bag of the accused-appellant and it was not recovered from the person of the accused. Hence, recovery of the trolley-bag does not attract of provisions of Section 50 of NDPS Act, 1985, but it is clear that after recovery, the *charas* from trolley-bag, police-personnel took the personal search of accused also, but for that recovery-memo shows that he was given an option to be searched before Gazetted Officer and that he denied. Accused-appellant signed consent letter also, which is Ex.ka2 on record. For this consent letter, learned counsel for the appellant has argued that it is written in Hindi-language while the accused-appellant does not know Hindi. It is also submitted that signature of accused was taken on blank-paper, but appellant could not prove that his signature was taken on a blank-paper. So far as language in Hindi is concerned, the arresting witnesses PW2 & PW3 have categorically stated in statements that they explained the matter to the accused in English-language. S.I.-Raja Murad Ali (PW3) from S.S.B. specifically said in his cross-examination that consent letter was prepared by S.I.-Ram Saran Yadav (PW2), which was translated and read over to the accused in English-language. PW2 also stated in his cross-examination that regarding consent letter, accused-appellant was told in English-language. In *State of Punjab vs. Baldev Singh*

(supra), it is held by Hon'ble Supreme Court that when an empowered officer or a duly authorized officer while acting on a prior information about to search a person, it is imperative for him to inform the person concerned of his right under sub-section 1 of Section 50 of the Act, 1985, of being taken to the nearest Gazetted Officer or nearest Magistrate for making the search. However, such information may not necessarily be in writing. Hence, in this case also, the accused-appellant was orally given option regarding search before a Gazetted Officer. Although, neither the police was acting on prior information nor *charas* was recovered from his person, it was recovered from his trolley-bag, therefore, it cannot be said that there was contravention and non-compliance of Section 50 of the Act, 1985.

14. Learned counsel for the appellant also argued that S.I.-Ram Saran Yadav (PW2) stated in his statement that at the time of occurrence, accused-appellant did not come to the spot in white-car while S.I.-Raja Murad Ali (PW3) clearly said that accused-appellant came at the place of occurrence in white-car, he has mentioned his car number also. Hence, this contradictory statement of PW2 and PW3 indicates that there was no recovery from the accused as there was no such occurrence took place and false recovery was planted from accused-appellant because being the foreign-national, police demanded illegal money from accused and when he refused to do so, he was falsely implicated in this case and for that reason, police did not make any public witness of this alleged occurrence. In my opinion, 10 kg. *charas* is recovered from the possession of the accused-appellant and learned AGA also submitted that the market-value of 10 kg. *charas* is of Rs.1 crore. Hence, it cannot be presumed that police planted the *charas* worth Rs.1 crore, falsely. So far as public-

witnesses are concerned, it can be safely assumed that it is very hard to procure public-witness because nobody wants to become witness in such type of cases, easily. Witnesses, examined in this case, are no doubt police-personnel, but they are relevant witnesses and their statements are consistent and corroborated each other. Therefore, keeping in view the above position and also keeping in view the fact that accused-appellant was caught by the combined team of Police and SSB, it can be safely assumed that prosecution did not withhold the public witnesses deliberately. In the statement under Section 313 Cr.P.C. before the trial court, the accused-appellant has stated that members of police-party demanded illegal money from him and due to not giving the money, they have falsely implicated. It is burden on accused-appellant to prove the said statement, but there is not even an iota of evidence in this regard. Appellant has also not shown any evidence, which could show that police-party or members of S.S.B. were having any enmity with the accused-appellant as the appellant is a foreign-national and there is no reason and occasion to have any enmity between the police and the accused-appellant. Hence, it cannot be said that police/prosecution withheld or suppressed public-witnesses with an ulterior motive and it could not extend any benefit in favour of the appellant.

15. Learned counsel for the appellant also submitted that report from Forensic Science Laboratory is not on record, therefore, it was not proved by the prosecution that the sample sent to the laboratory was found to be *charas.* In this regard, I do not agree with the submission aforesaid made by counsel for the appellant. Perusal of record shows that chemical examination report of Forensic Science Laboratory, Varanasi, is very much on record.

Learned counsel for the appellant objected that if there is such report, it is not exhibited and, hence, it cannot be read in evidence.

16. Report of Forensic Science Laboratory is a public document. It would be relevant to quote Section 293 Cr.P.C. for ready reference:

> **Section 293 in the Code Of Criminal Procedure, 1973**
>
> **293.** *Reports of certain Government scientific experts.*
>
> *(1) Any document purporting to be a report under the hand of a Government scientific expert to whom this section applies, upon any matter or thing duly submitted to him for examination or analysis and report in the course of any proceeding under this Code, may be used as evidence in any inquiry, trial or other proceeding under this Code.*
>
> *(2) The Court may, if it thinks fit, summon and examine any such expert as to the subject- matter of his report.*
>
> *(3) Where any such expert is summoned by a Court and he is unable to attend personally, he may, unless the Court has expressly directed him to appear personally, depute any responsible officer working with him to attend the Court, if such officer is conversant with the facts of the case and can satisfactorily depose in Court on his behalf.*
>
> *(4) This section applies to the following Government scientific experts, namely:-*
>
> *(a) any Chemical Examiner or Assistant Chemical Examiner to Government;*
>
> *(b) the chief Inspector of- Explosives;*
>
> *(c) the Director of the Finger Print Bureau;*
>
> *(d) the Director, Haffkeine Institute, Bombay;*
>
> *(e)* the Director, Deputy Director or Assistant Director of a Central Forensic Science Laboratory or a State Forensic Science Laboratory*;*
>
> *(f) the Serologist to the Government.*

17. Hence, as per the provision of Section 293 Cr.P.C., the

report of State Forensic Science Laboratory is admissible in evidence and there is no requirement to call the Director of that laboratory to get the report proved. The report on record shows that the sample sent to it was found to be *charas.* The remaining recovered *charas* was produced before learned trial court during trial and it was proved by S.I.-Ram Saran Yadav (PW2) as material Exhibits 1, 2, 3 & 4 before learned trial court.

18. No other point or argument was raised by learned counsel for the appellant before this Court.

19. In view of above, I reach on definite conclusion that prosecution proved its case beyond any reasonable doubt and the appellant has been rightly convicted and sentenced by learned trial court.

20. Accordingly, the appeal lacks merit and is **dismissed**.

Order Date :- 16.8.2021
LN Tripathi

(Ajai Tyagi, J.)