

HIGH COURT OF JAMMU AND KASHMIR AT JAMMU

Cr. Appeal no. 34/2008
Cr.M.P nos. 53/08 & 45/2009

Date of Decision: **24.08.2009**

Mumtaz Ahmad *vs.* ***State of J&K***

CORAM:

MR. JUSTICE HAKIM IMTIYAZ HUSSAIN, JUDGE.
MR. JUSTICE J. P. SINGH, JUDGE.

Appearing counsel:

For Appellant(s) : Mr. Nirmal Kotwal, Advocate.

For Respondent(s) : Mr. S.C.Gupta, AAG.

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| i) | Whether approved for reporting
in Press/Journal/Media | : | Yes |
| ii) | Whether to be reported
in Digest/Journal | : | Yes |
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J.P.Singh, J:

The appellant, Mumtaz Ahmad, has filed this appeal questioning Special Judge, Udhampur's judgment of December 1, 2008, convicting and sentencing him to imprisonment for twenty years and fine of two lac rupees, under Section 8/20 of the Narcotic Drugs and Psychotropic Substances Act, 1985.

FACTS:

Head Constable Ghulam Mohi-Ud-Din, along with Constables Naresh Kumar, Jagdish Singh and Mohd. Altaf of Police Station Rehambal, was on duty at Garnai Bye-pass Check Post, Naka, on January 30, 2007, when at about 4.00 p.m, he found, 95 maize cob leaves, in a

Plastic Bag, which, Mumtaz Ahmad, of District Anantnag, Kashmir, residing at Thanda Paddar Zallar, Udhampur, was carrying over his shoulder.

A case FIR no. 14/07 was, accordingly, registered at Police Station, Rehambal of District Udhampur under Section 8/20 of the Narcotic Drugs and Psychotropic Substances Act, 1985, hereinafter to be referred as, the "Act", for short, on the report of Head Constable Ghulam Mohi-Ud-Din.

The Station House Officer seized the material on spot which weighed 4.65 kg. 100 gm was taken out of it for test purposes. The sample and the remaining material weighing about 4.65 kg was sealed separately.

The sample of the seized material, on examination by the Forensic Science Laboratory, Jammu, during the investigation, tested, CHARAS.

A Final Police Report was, accordingly, laid with the Special Judge, Udhampur indicating the appellant to have committed the offence punishable under Section 8/20 of the Act.

Finding a case for the trial, the appellant was charged under Section 8/20 of the Act to which he pleaded 'Not Guilty' and claimed to be tried.

The prosecution examined all the twelve witnesses cited in the Final Police Report, to sustain the charge.

Denying the circumstances appearing in the evidence against him, the appellant examined DW-Mohd. Farooq, his brother-in-law, and DW-Bashir Ahmad, his father, besides DW-Mohd. Iqbal, in defence, pleading false involvement, and projecting his innocence.

The appellant's learned counsel has questioned the judgment impugned in the appeal, urging that the appellant's conviction was illegal, for the non-compliance of the mandatory provisions of Sections 50 & 57 of the Act by the investigating agency during the search and seizure of the material alleged to be a Narcotic Drug. The findings recorded by the learned Special Judge against the appellant have been questioned on the ground of mis-appreciation of evidence by the learned Special Judge. The sentence awarded to the appellant too has been questioned as unjustified, in the facts and circumstances of the case.

Supporting the judgment impugned in the appeal, learned Additional Advocate General, appearing for the State says that the conviction and sentence recorded by the learned Special Judge was justified in view of the overwhelming evidence produced by the prosecution, proving to the hilt that the appellant has committed a heinous offence for which he has been awarded requisite punishment provided under the Act.

We have considered the submissions made at the Bar in the light of the evidence produced in the case.

Although the learned Special Judge has reproduced the statements of the witnesses in his judgment, yet in order to deal with the submissions advanced by learned counsel for the parties, a brief reference to the statements of the witnesses becomes necessary.

PW-1 Head Constable Ghulam Mohi-Ud-Din, while giving the account of the moments leading to his finding Charas wrapped in 95 maize cob leaves in the Plastic Bag

which the appellant was found carrying, when stopped for search at the Check Post at about 4.00 p.m on January 30, 2007, has testified to EXPW-GM, the Docket, which was sent by him to the Officer Incharge of Police Station, Rehambal, for registration of case under Section 8/20 of the Act.

PWs-2,3 & 5, Constables Jagdish Singh, Naresh Kumar and Mohd. Altaf, have supported the version of PW-1 saying that, when stopped at *Naka*, on January 30, 2007, the appellant was found carrying a Plastic Bag which contained 95 maize cob leaves in which Charas had been concealed.

PW-6 Head Constable Mohan Lal deposes having received EXPW-GM, the Docket, sent by Head Constable Ghulam Mohi-Ud-Din at about 4.30 p.m in Police Station Rehambal. He along with the Station House Officer, Constable Krishan Lal and Chowkidar Naresh Kumar went to the *Naka* and found that PW-1 had detained the appellant with 95 maize cob leaves in his Plastic Bag, which weighed 5.3 kg. The sample taken out of the material wrapped in the cob leaves, weighed 100 gm. He admits as correct, the contents of EXPW-JS, the Seizure Memo of Charas, and his signatures thereon as an attesting witness.

PW-7 Naresh Kumar, Chowkidar, though hostile to the prosecution, deposed that he had come to know on January 30, 2007 at 4.30 p.m that a person had been arrested by the police at the *Naka*. Reaching there, he found the appellant, who was carrying a Bag, in the police custody. The Station House Officer told him about

the seizure of Charas from him. Admitting his signatures on EXPW-JS, the superdnama, he, however, denies the seizure of Charas and drawing of samples from the seized material.

PW-9, Sukhdev Singh, the Selection Grade Constable, deposes to have carried a packet in the month of February, 2007 from Police Station, Rehambal to the Forensic Science Laboratory, Jammu, where it was deposited vide receipt placed on the records.

PW-10 Gandhrab Singh, Tehsildar, the Executive Magistrate, Ist Class, affirms to have opened the packet produced before him by the Station House Officer, Rehambal on 5.2.2007, which was found containing Charas. He delivered it back to the Police Officer, after its re-sealing issuing EXPW-GS addressed to the Director Forensic Science Laboratory, Jammu to break open the seal for chemical analysis and expert opinion, after examining the sample.

PW-11, Pawan Abrol, the Scientific Assistant, Forensic Science Laboratory, Jammu, certifies EXPW-PA, the Report which had been sent to the Additional Superintendent of Police, Udhampur, indicating that a sealed packet, received in the Directorate on 10.02.2007 through Selection Grade Constable Sukhdev Singh in connection with FIR no. 14/2007 of Police Station Rehambal, was found bearing six intact seals which tallied with the specimen seal impression forwarded by the Tehsildar, Executive Magistrate, Ist Class, Udhampur. On its opening, it was found to contain small flat shaped irregular pieces of greenish black coloured

material, which were marked E-211/2007. It weighed 98 gm.

When subjected to various chemical, microscopical and chromatographic examinations, it was identified as "Charas".

PW-12, Rajinder Sharma, SI has deposed that on received a Docket from HC Ghulam Mohi-Ud-Din, EXPW-RS, case FIR no. 14/2007, was registered in the Police Station.

During the course of investigation, he prepared EXPW-RS-1, the site plan, seized Charas from the appellant vide Seizure Memo EXPW-JS, and prepared the superdnama with the seal marked as EXPW-JS-1. He thereafter sent wireless message to his superior officers informing them about the seizure of Charas and arrest of the appellant, as required under Section 57 of the Act. The seized articles were kept in the depository, known as *Mal-khana*, which were got re-sealed on 05.02.2007. The Additional Superintendent of Police, Udhampur, sent the sample to the Forensic Science Laboratory for chemical examination, vide his communication of February 8, 2007, through SGC Sukhdev Singh. The sample, according to the report of the Forensic Science Laboratory, had tested Charas. He identified the three packets marked A, A-1 and A-2 produced in the case.

DW-Mohd. Farooq, the brother-in-law of the appellant, projects that the police had come to his house, on January 29, seeking information about the appellant. He accompanied the police to the appellant's house where he was found sleeping. The police had taken him

along saying that the appellant was required in connection with a case of smuggling of bovine animals. According to him, the case had been fabricated against the appellant in connivance with Mr. Latief, who had been refused marriage with the appellant's sister.

DW-2 Bashir Ahmed, says that he along with the appellant were sleeping in a tent at Thanda Paddar Udhampur, when at about 3 a.m, Mohd. Farooq, his son-in-law and Latief had come there along with the Station House Officer and some police personnel of Police Station, Rehambal.

DW-3 Mohd. Iqbal supports the version of DWs-1 & 2.

DISCUSSION:

We will now proceed to deal with the submissions made at the Bar.

We have examined the statements of the prosecution witnesses. Their cross-examination does not indicate any such contradiction, inconsistency or other material, on the basis whereof, the facts deposed to by them be doubted.

The presence of the appellant at the Police Check Post on January 30, 2007 at 4.00 p.m has been established beyond any shadow of doubt because even PW-7 Naresh Kumar, the Chowkidar, who has turned hostile to the prosecution, proves the appellant's presence at the *Naka* on the aforementioned date and time. The seizure of 95 maize cob leaves lying in the Plastic Bag carried by the appellant, too, stands proved by PWs-1, 2, 3 & 5.

In view of the overwhelming evidence produced by the prosecution, it stands established that the appellant, when stopped at the Police Check Post on January 30, 2007 at 4.00 p.m was found carrying the plastic bag which contained 95 cob leaves in which Charas like material was found wrapped.

We do not find any substance in the appellant's counsel's submission that in the absence of any civilian, witnessing the seizure of Charas from the appellant, the statements of the police officials cannot be believed. This is so because no law, in force, in the State, makes corroboration of the statements of the police officials, a condition precedent for relying upon their testimony.

Law does not contemplate any distinction in the statements made by the witnesses on the basis of their status. The statement of a witness cannot thus be discarded merely because of his status as a police official.

All that is required to be seen while appreciating evidence in a criminal trial, in this respect, is, as to whether or not, the testimony of the witness produced during the trial, is cogent, consistent and credible and there was no prohibition under any law for acceptance of such evidence.

Unless found to be unreliable, false, unnatural, or otherwise unacceptable, for one or the other justifiable reason(s), the statement of the witness would warrant consideration for acceptance, even without corroboration, which, as a matter of caution, may be required only in those cases where the Court may not find it otherwise

safe, for one or the other justifiable reason, to rely on the statement, in the absence of corroboration.

Learned Special Judge has given cogent reasons for disbelieving the defence witnesses and accepting the prosecution evidence, put in to prove that the appellant, when stopped at the Police Check Post Garnai Bye-pass, Udhampur, was found carrying a plastic bag over his shoulder, which contained 95 maize cob leaves in which Charas had been concealed.

We do not find any reason to disagree with this finding of the learned Special Judge, which is based on the testimony of PWs-1, 2, 4 & 5 which is corroborated by PW-6, Krishan Lal and PW-12 Rajinder Sharma, SHO, Police Station, Rehambal, who on reaching the police post, had found the appellant with the plastic bag in which Charas was found concealed in the maize cob leaves. The prosecution witnesses have stood the test of the cross-examination and their statements are found believable by us, additionally, because of the immediate lodging of the FIR, its receipt by the learned Special Judge, Udhampur on the next day and in view of the order passed by the Judicial Magistrate, Ist Class, Udhampur on January 31, 2007, on the application of the Station House Officer giving a detailed account of the arrest of the appellant and seizure of the maize cob leaves carrying Charas in a plastic bag in presence of the witnesses, who have been produced by the prosecution to support its case.

The other submission of the appellant's counsel that the Investigating Agency had not complied with the

provisions of Section 50 of the Act in the case while searching the ‘person’ of the appellant, too is found to be without merit, in that, the Investigating Agency had not searched the ‘person’ of the appellant as such, requiring compliance of the provisions of Section 50 of the Act, for, the search of the bag, or for that matter, any other container, briefcase, or such like article, carried by a person as container, may not amount to the search of a person in terms of the provisions of Section 50 of the Act requiring its compliance. We are supported in taking this view by *State of Rajasthan v. Babu Ram*, reported as AIR 2007 SC 2018, where their Lordships of Hon’ble Supreme Court of India held as follows:-

“A bag, briefcase or any such article or container, etc. can, under no circumstances, be treated as body of a human being. They are given a separate name and are identifiable as such. They cannot even remotely be treated to be part of the body of a human being. Depending upon the physical capacity of a person, he may carry any number of items like a bag, briefcase, a suitcase, a tin box, a thaila, a jhola, a gathri, a holdall, a carton, etc. of varying size, dimension or weight. However, while carrying or moving along with them, some extra effort or energy would be required. They would have to be carried either by the hand or hung on the shoulder or back or placed on the head. In common parlance it would be said that a person is carrying a particular article, specifying the manner in which it was carried like hand, shoulder, back or head, etc. Therefore, it is not possible to include these articles within the ambit of the word “person” occurring in Section 50 of the Act.”

Appellant's counsel's submission that Section 57 of the Act had not been complied by the Investigating Agency after the seizure of Charas and arrest of the appellant is found devoid of any merit in view of the statement of the Station House Officer to the effect that he had sent a wireless message to his superiors informing them as required under Section 57 of the Act. The statement of the SHO, made in this regard, has not been questioned in the cross-examination by the appellant. The wireless message sent by the SHO forms part of the records. The application filed by the SHO before the Judicial Magistrate, Ist Class, on January 31, 2007, too, records the SHO to have complied with the provisions of Section 57 of the Act.

All the contentions raised by the appellant's counsel questioning the appellant's conviction, having failed, we do not find any ground to interfere with the findings of the learned Special Judge and his holding the appellant guilty under Section 8/20 of the Act for being in possession of 4.65 kg of Charas wrapped in 95 maize cob leaves, when stopped at Garnai Bye-pass Check Post on January 30, 2007. The finding of the learned Special Judge is, accordingly, affirmed.

We will now deal with the appellant's plea questioning the maximum sentence awarded to him pursuant to his conviction under Section 8/20 of the Act.

While awarding the maximum punishment, the learned Special Judge has observed as follows:-

"For sentencing the accused it is noticed that he has committed a heinous offence; more than a murder. In murder, one to two or three persons are killed by a person. But drug smuggler

is instrumental in wiping off generations. A druggist does not die in easy manner but a painful death. It bankrupts him mentally, physically and economically. It shatters and batters him in body and soul. The drug suppliers are more dangerous. They are black souls. For earning some hundreds of rupees or even thousands, they supply, in fact, silent killer drugs, which in turn not only destroys the life of a person but his family suffers immeasurable pain and agony. Such persons are required to be dealt with strong hands. Drugs carrier and supplier is most condemnable person than a druggist. Drug trafficking is a menace for the society. It also shatters the economy of the country. Drugs are difficult to be procured ordinarily or easily. The vacuum is filled by drug supplier if there is check on the supply of drug, it can effectively reduce the number of druggist. At least, the new generation can be saved from consuming drugs, if number of drug supplier is cut to size. That is only possible by giving heavy dose of punishment to them, so that any person intending to adopt the profession of drug supply may think twice before adhering to such profession. It is true that crime cannot be eradicated completely from the society, but at least endure can be made to contain such crimes. It is in this background that legislatures have prescribed heavy punishment for possessing and smuggling the narcotic drugs and psychotropic substances.

In the present case the accused has dared to smuggle more than 4 kg of Charas. So he is required to be punished with the maximum sentence provided by law, which will meet the ends of justice. So, he is sentenced to rigorous imprisonment of twenty years and fine of Rs. 2 lacs. In case, he fails to pay the fine, he shall suffer further imprisonment of five years of like nature.”

It is no doubt true that the appellant was found in possession of more than four kilogram of Charas, a narcotic drug, beyond the ‘commercial quantity’ indicated under the Act, which had the potential of affecting severally its consumers in the Society, thereby affecting,

the health and mind, of so many, besides affecting manifold, the Nation too; but that may not, be the only determining factor for considering award of Maximum punishment to a person found guilty of the offence under the Act.

The age, antecedents, character, status, financial position and various other factors, *inter alia*, including the dependence of others on the person found guilty, and the nature of their dependence on him, are required to be kept in mind while considering the award of punishment.

The trial Court has not taken into consideration any of the aforementioned factors while sentencing the appellant, and in this view of the matter, we find it difficult to uphold the award of Maximum sentence provided for the offence, under the Act to the appellant by the learned Special Judge.

Where the statute prescribes, the Minimum and the Maximum sentence for the offence, aggravating circumstances, and the reasons to support the award of Maximum punishment, are required to be spelt out by the Court, justifying the sentence awardable to the one found guilty.

The prosecution does not indicate the appellant to have any past history of Drug smuggling and all that appears from the evidence is that he belongs to a poor strata of the Society. He was found carrying Rs. Four (Rs.04) only with him at the time of his search.

In the absence of any aggravating circumstances projected against the appellant by the prosecution, justifying award of Maximum punishment, provided for

the offence, of which the appellant has been convicted, we, in the circumstances of the case, are of the view that the sentence awarded to the appellant needs to be reduced to twelve years and fine of Rs. 1.00 lakh.

This appeal is, accordingly, disposed of, up-holding the appellant's conviction under Section 8/20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 but reducing the sentence awarded to the appellant, to twelve years and fine of Rs. 1.00 lakh and in default whereof, to further imprisonment for one year.

(J. P. Singh) (Hakim Imtiyaz Hussain)
Judge Judge

JAMMU
24.08.2009
Pawan Chopra