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GIRISH RAGHUNATH MEHTA

v.

INSPECTOR OF CUSTOMS AND ANOTHER

(Criminal Appeal Nos. 1020-1021 of 2009)

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SEPTEMBER 07, 2016

[C. NAGAPPAN AND ADARSH KUMAR GOEL, JJ.]

Narcotic Drugs and Psychotropic Substances Act, 1985:

C *s.15 r/w. s.8(c), s.67 – Unauthorized sale of contraband – Opium poppy straw allegedly sold by appellant-accused without any bills and authorization – Co-accused was apprehended with 30 Kg. of poppy straw on raid by PW1- Inspector of Customs and PW5 – Co-accused stated poppy straw was purchased by him from appellant without any bill – Positive test for presence of opium by field testing kit in sample collected – Appellant gave statement u/*
D *s.67 that he had sold 30 Kg. of poppy straw powder to co-accused without receipt and medical prescription – Conviction of appellant – Propriety – Held: No serious infirmity in the findings recorded by the courts below in convicting and sentencing the appellant – Prosecution version based not only on the statement u/s.67 but*
E *also on evidence of recovery of the contraband immediately after sale and circumstances showing that the contraband was sold by the appellant to the co-accused, without any authorization – Maharashtra Narcotic Drugs and Psychotropic Substances Rules, 1985.*

F *ss. 42 and 43 – Applicability of – Discussed – s.42 applies when the contraband recovered from a building, conveyance or enclosed place and whereas s.43 applies where recovery is from a public place.*

Dismissing the appeals, the Court

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HELD: 1. Both the courts below had concurrently held that the appellant was found to have sold the contraband to the co-accused without any licence. The said finding, *inter alia*, was based on the evidence of PW1, Inspector of Customs who seized the contraband from the co-accused. The evidence in the form of statement of the appellant himself (Ex.-20) u/s. 67 of the Narcotic

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Drugs and Psychotropic Substances Act, 1985 before his arrest clearly shows that the appellant had sold the contraband to the co-accused who did not have any licence to purchase thereof. The connection of contraband with the appellant was clearly established after which the burden was on appellant to show that he had effected sale to an authorized person. Recovery from the co-accused was from an open place to which Section 42 of the Act was not attracted. At the time of production of gunny bag no objection was raised on behalf of the appellant that the bag did not carry any label or sign of identity. The absence of label and sign of identity could not be presumed. The samples were duly tested by the chemical analyzer and were found to be intact. There was no serious infirmity in the findings recorded by the courts below in convicting and sentencing the appellant. [Para 9][210-A-D]

State of Rajasthan v. Jag Raj Singh (2016) 6 SCALE 32; *Tofan Singh v. State of Tamil Nadu* (2013) 16 SCC 31 : 2013 (9) SCR 962; *Union of India v. Bal Mukund* (2009) 12 SCC 161 : 2009 (5) SCR 205; *Raju Premji v. Customs NER Shillong Unit* (2009) 16 SCC 496 : 2009 (7) SCR 839; *Noor Aga v. State of Punjab* (2008) 16 SCC 417 : 2008 (10) SCR 379 – referred to.

2.1 There can be no doubt that the Court had to satisfy itself that the statement u/s.67 was made voluntarily and at a time when the person making such statement had not been made an accused. Whether the statement was voluntary and free from encumbrance had to be judged from the facts and circumstances of each case. [Para 11][211-A-B]

2.2 However, in the present case, it is not necessary to go into this aspect as there was adequate evidence to prove the sale of the contraband by the appellant for which co-accused had been convicted and sentenced. The prosecution version was based not only on the statement u/s. 67 but also on the evidence of recovery of the contraband immediately after sale and the circumstances showing that the contraband was sold by the appellant to the co-accused, without any authorization. [Para 11][211-C-D]

A *Abdul Rashid Ibrahim Mansuri v. State of Gujarat* (2000) 2 SCC 513 : 2000 (1) SCR 542; *Sukhdev Singh v. State of Haryana* (2013) 2 SCC 212 : 2012 (11) SCR 964; *Sajan Abraham v. State of Kerala* (2001) 6 SCC 692 : 2001 (1) Suppl. SCR 335 – referred to.

B Case Law Reference

	2000 (1) SCR 542	referred to	Paras 7, 10
	(2016) 6 SCALE 32	referred to	Para 7
	2012 (11) SCR 964	referred to	Para 7
C	2013 (9) SCR 962	referred to	Para 7
	2009 (5) SCR 205	referred to	Para 7
	2009 (7) SCR 839	referred to	Para 7
	2008 (10) SCR 379	referred to	Para 10
D	2001 (1) Suppl. SCR 335	referred to	Para 10

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal Nos. 1020-1021 of 2009.

E From the Judgment and Order dated 12.09.2007 in Criminal Appeal No. 732 of 2006 with Criminal Application No. 1355 of 2006 passed by the High Court of Judicature at Bombay.

Anand Grover, Sr. Adv., Purushottam Sharma Tripathi, Mukesh Kumar Singh, Luv Kumar, Ms. Tripti Tandon, Advs. for the Appellant.

F Yashank Adhyaru, Sr. Adv., Ms. Sushma Manchanda, Shankar Divate, B. K. Prasad, Mahaling Pandarge, Addl. Govt. Adv., Nishant Ramakantrao Katneshwarkar, Advs. for Respondent.

The Judgment of the Court was delivered by

G **ADARSH KUMAR GOEL, J.** 1. These appeals have been preferred by the appellant against his conviction under Section 15 read with Section 8(c) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short “the Act”) and sentence to undergo rigorous imprisonment for four years and to pay fine of Rs.20,000/-, to further undergo rigorous imprisonment for six months, in default of payment of fine, for illegal sale of 30 Kgs. of poppy straw to the co-accused- A-2,

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who did not have valid licence as per the Maharashtra NDPS Rules, 1985. A

2. Case of the prosecution is that the Inspector of Customs, NCCP Customs, Mumbai received intelligence information on 26th February, 2004 that the appellant was selling crushed opium poppy straw without any bills on cash basis from his premises at 6, Pravin Chambers, Keshvji Naik Road, Mumbai. Co-accused- Karim Patel was to purchase 30 kgs. of poppy straw. A raid was organized and Karim Patel was apprehended with 30 Kgs. of poppy straw. The raid was conducted by PW1- Bhaskar Shetty, Inspector of Customs, along with others including PW5- Canute Menezes. The said accused stated that he had purchased the poppy straw without any bill on cash payment of Rs.5400/-. On search of the premises belonging to the appellant, some documents were recovered. Appellant was found in the shop and stated that he was proprietor and a lady present there was the manager of the firm. Co-accused- Karim Patel, who was also brought by the raiding party with it, opened the bag which had colored powder in a polythene bag. A small quantity was tested on the Field Testing Kit and result was positive for the presence of opium. The powder was weighed and found to be 30 Kgs. Three samples of 24 grams each were collected and sealed. Remaining powder was sealed and kept in the same bag. The label with signatures of panchas and the investigating officer PW1- Bhaskar Shetty was affixed on the bag. Co-accused- Karim Patel identified the appellant as the person who had sold the powder to him without bill on cash payment. It is not relevant to mention about the rest of stock of opium kept in the shop and thereafter recovery of cash amount from the house of the appellant as conviction of the appellant has been upheld only for the charge mentioned earlier. Co-accused- Karim Patel also stated that he had purchased poppy straw powder on several occasions from the appellant and sold the same. B
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3. Statement of the appellant was recorded under Section 67 of the Act on 27th February, 2004 to the effect that he had sold 30 Kgs. powder to A-2 without receipt and without medical prescription. A-2 did not have valid permit. After completion of investigation, both the accused were sent up for trial. G

4. The prosecution examined 11 witnesses which included investigating officer who effected recovery of the contraband, H

A Superintendent of Customs who received information, Assistant Chemical Examiner, the landlord of the premises in possession of the appellant as a licensee/ tenant and the PSI of the State Excise.

B 5. The trial court convicted and sentenced the appellant not only for the offence mentioned above but also for illegal possession of commercial quantity of poppy straw powder.

C 6. On appeal, the High Court partly allowed the appeal, quashed and set aside the conviction and sentence for illegal possession of commercial quantity of poppy straw powder but upheld the conviction and sentence for illegal sale transaction of 30 kgs. of poppy straw powder. The High Court also upheld the conviction of co-accused for abetment of the said offence by purchasing 30 kgs. of poppy straw powder from the appellant without any valid licence and permit. The co-accused has not preferred any appeal as stated by the learned counsel. The appellant has undergone the sentence during pendency of the proceedings.

D 7. Learned counsel for the appellant has taken the Court through the evidence on record and submitted that conviction and sentence awarded to the appellant was unsustainable. There are discrepancies in recording of prior information, resulting in violation of mandatory requirement of Section 42 of the Act. Reference was made to intelligence note, Ex.-47, and statement of PW4 to submit that information was received one or two days prior to 26th February, 2004 during investigation of an earlier case while it was recorded only on 26th February, 2004 and not immediately. There are contradictions in time and manner of recording of information, Ex.18, while there is another note which is contradictory. Reliance has been placed on *Abdul Rashid Ibrahim Mansuri v. State of Gujarat*¹, *State of Rajasthan v. Jag Raj Singh*² and *Sukhdev Singh v. State of Haryana*³. It was further submitted that the gunny bag produced in Court did not carry the label and the signatures. The same could not be linked to the appellant. PW2 was unable to say whether the bag produced had seal or label or not. He also submitted that record of the samples was not maintained. Panchas were not examined. Same Panchas were used for several occasions. He also submitted that the statement of the accused under Section 67 amounted to confession before police and was not admissible as held in *Tofan*

¹ (2000) 2 SCC 513

² (2016) 6 SCALE 32

³ (2013) 2 SCC 212

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*Singh v. State of Tamil Nadu*⁴, *Union of India v. Bal Mukund*⁵, *Raju Premji v. Customs NER Shillong Unit*⁶ and *Noor Aga v. State of Punjab*⁷. Even if the statement of the appellant under Section 67 was admissible, it was a weak piece of evidence and had only corroborative value. No independent witness was joined while recording the statement. The appellant was in custody at the time of recording the statement. The statement was not voluntary. Its contents were not read over to him. A-2 was also in custody and his statement was also not voluntary. Statement of co-accused could not be taken as substantive evidence. The same could not be relied upon in view of the decision in *Bal Mukund* and *Raju Premji (supra)*.

8. Learned counsel for the State supports the conviction and sentence of the appellant. He submitted that concurrent finding of the courts below is based on evidence and the same is not liable to be disturbed in an appeal under Article 136 of the Constitution. It was pointed out that the contentions advanced by the learned counsel for the appellant are not shown to have been raised before the High Court. He next submitted that Section 42 applies only when recovery is to be effected from a building, conveyance or enclosed place. Present case is covered by Section 43 as recovery is from a public place. As regards the plea of absence of label, neither any question was raised at the time of production of the bag nor the fact of recovery of the contraband from co-accused is in dispute. Recovery was proved by independent direct evidence. Co-accused from whom recovery was effected has not even challenged his conviction. As regards the record of samples, it is pointed out that the evidence of the chemical examiner-PW8 is categorical that all the samples were in sealed condition. The appellant never retracted his statement under Section 67 to the effect that the contraband recovered from co-accused was sold by the appellant and that the said co-accused had no licence to purchase the contraband and thereby the appellant contravened the conditions of his licence. He was not in custody when his statement was recorded as is clear from the statement of PW2-Gerard Joseph, who recorded the statement.

9. After due consideration, we do not find any merit in the

⁴ (2013) 16 SCC 31

⁵ (2009) 12 SCC 161

⁶ (2009) 16 SCC 496

⁷ (2008) 16 SCC 417

A submissions on behalf of the appellant. Both the courts below have
concurrently held that the appellant was found to have sold the contraband
to the co-accused without any licence. The said finding, *inter alia*, is
based on the evidence of PW1- Bhaskar Shetty, Inspector of Customs
who seized the contraband from the co-accused- Karim Patel. Further,
B the evidence in the form of statement of the appellant himself (Ex.-20)
under Section 67 of the Act before his arrest clearly shows that the
appellant had sold the contraband to the co-accused- Karim Patel who
did not have any licence to purchase thereof. Even otherwise, the
connection of contraband with the appellant was clearly established after
C which the burden was on appellant to show that he had effected sale to
an authorized person. Recovery from the co-accused was from an
open place to which Section 42 of the Act is not attracted. At the time
of production of gunny bag no objection was raised on behalf of the
appellant that the bag did not carry any label or sign of identity. Thus,
the absence of label and sign of identity could not be presumed. The
D samples were duly tested by the chemical analyzer and were found to
be intact. There is, thus, no serious infirmity in the findings recorded by
the courts below in convicting and sentencing the appellant.

10. The contention raised on behalf of the appellant on the basis
of judgments of this Court in *Abdul Rashid Ibrahim Mansuri*, *Jag*
Raj Singh and *Sukhdev Singh* (*supra*) cannot be accepted. As already
E noticed, Section 42 of the Act has no application to the fact situation of
the present case. The said section applies when the contraband recovered
from a building, conveyance or enclosed place. Where recovery is from
a public place, Section 43 applies. This Court reconciled the view taken
in *Abdul Rashid Ibrahim Mansuri* (*supra*) and *Sajan Abraham v.*
F *State of Kerala*⁸ in larger bench judgment in *Sukdev Singh* (*supra*). It
was held that in view of technological advancements, it may not be
possible to record information as per the requirement of Section 42.
Strict compliance by the investigating agency should not be required in
an emergency situation so as to avoid misuse by wrongdoers/ offenders/
G drug peddlers⁹. Whether there is adequate substantial compliance is a
question of fact in each case. Apart from the finding that present case
is governed by Section 43, there is no ground to interfere with the
concurrent finding of the Courts below that there is adequate compliance

* (2001) 6 SCC 692

⁹ (2009) 8 SCC 539 - Para 34

of Section 43 of the Act.

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11. Similarly, the contention on the basis of the judgments in *Tofan Singh, Raju Premji* and *Noor Aga* (supra) also cannot be accepted. There can be no doubt that the Court has to satisfy itself that the statement under Section 67 was made voluntarily and at a time when the person making such statement had not been made an accused. Whether the statement is voluntary and free from encumbrance has to be judged from the facts and circumstances of each case. In *Tofan Singh* (supra), the question whether the investigating officer investigating the matter under the Act is a police officer and whether the statement recorded by the investigating officer under Section 67 of the Act can be treated as a confessional statement has been referred to the larger Bench. It is not necessary to go into this aspect in the present case as there is adequate evidence to prove the sale of the contraband by the appellant for which co-accused has been convicted and sentenced. The prosecution version is based not only on the statement under Section 67 but also on the evidence of recovery of the contraband immediately after sale and the circumstances showing that the contraband was sold by the appellant to the co-accused, without any authorization. Thus, we do not find any ground to interfere with the conviction and sentence awarded to the appellant.

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12. The appeals are dismissed.

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Ankit Gyan

Appeals dismissed.