Durand Didier

Vs

Chief Secretary, Union Territory of Goa

Criminal Appeal No. 533 of 1989

(N. Natarajan, S. R. Pandian JJ)

29.08.1989

JUDGMENT

1. Special leave granted.

2. The appellant who is a French national has preferred this appeal under Article 136 of the Constitution of India canvassing the correctness of his conviction under Sections 21, 20(b)(ii) and 18 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for brevity hereinafter referred to as the 'Act') and the sentence of 10 years rigorous imprisonment in addition to pay a fine of Rs. 1,00,000 in default to undergo rigorous imprisonment for one year inflicted by the Court of Sessions Judge, South Goa, Margao and confirmed by the High Court of Bombay, Panaji Bench (Goa) with a modification of the default sentence from one year to six months on the indictment that the appellant on December 7, 1987 at about 0.40 hours at Colva was found in possession of prohibited drugs - namely 51 gms. of brown sugar, 45 gms. of ganja oil and 55 gms. of opium all worth approximately Rs. 13,465 without valid documents.

3. Adumbrated in brief, the relevant facts of the prosecution case giving rise to this appeal are as follows :

On December 6, 1987 at about 11.00 p.m. the Assistant Sub Inspector of Police, Shri Laxman Mahalsekar (PW 7) while along with his police party was on his patrol duty at the 3rd ward of Colva, saw the appellant speeding up his motorcycle, bearing registration No. GDK 851 ignoring his signal to stop. The appellant in such attempt, presumably to escape from being nabbed by the police lost control over the vehicle and fell down. No sooner he stood up and removed a paper wrapping from his pant pocket and threw it away. PW 7 on entertaining suspicion over the conduct of the appellant verified that wrapping to contain small quantity of brown sugar and then he took the appellant along with his motorcycle to the nearby police outpost. A hand bag, bluish in colour with red stripes had been attached to the motorcycle. When the said bag was opened with a key handed over by the appellant and examined in the presence of two pancha witness, namely Francis Xavier D'Silva (PW 1) and one Connie D'Silva (not examined), it was found to contain some personal belongings such as wearing apparels, a pair of shoes and a canvas bag. Inside the bag, there was one shaving cream tube, one camera, a torch and four plastic rolls. There was also one plastic bag containing contraceptives. The torch was found to contain two bundles of plastic material each one containing a small piece of blackish substance. Inside the cream tube, four bundles wrapped in a plastic material were found, Each of the bundles contained small pieces of blackish substances. There was also one more bundle of plastic material concealed in the shoes which when opened was found to contain small piece of blackish substance similar to the one found in the torch as well in the shaving cream tube. The camera was found in a box in which there were five packets of plastic

material with some powder of yellowish colour i.e. brown sugar. According to PW 7, there were 50 gms. of brown sugar hidden in the camera case, 45 gms. of ganja oil in the steel container and 55 gms. of opium in the shaving cream tube, torch and shoes. All the materials were weighed and seized under a panchnama (Exz. P 1) attested by PW 1 and Connie D'Silva. The appellant was arrested and kept under medical treatment and observation. Samples of these articles were sent to Chemical Analyst (PW 6) who has deposed that she received three envelopes Exs. 1 to 3. According to her, the envelope market Ex. 1 contained 1.57 gms. of substance which on analysis was found to contain 16. 8 per cent w/w/ of morphine (which is an alkaloid extracted from opium i.e. conversion of opium). The quantity of the substance namely a dark brown soft mass having characteristic colour of opium found in the envelope Ex. 2, weighing 2.45 gms. was not sufficient to carry out further analysis. The substance in envelope Ex. 3 weighing 2.07 gms. on analysis was found to contain a dark brown sticky substance having odour similar to that of extract of cannabis. PW 6 gave her report (Ex. P 3) dated February 8, 1988. P.W.7, after receiving Ex. P 3 and completing the investigation charge-sheeted the accused under the provisions of the Act on the ground that the appellant was in possession of prohibited drugs without a valid licence or permit or authorisation violation of Section 8 punishable under the penal provisions of the Act.

4. The defence of the appellant is one of total denial. As pointed in the earlier part of this judgment both the trial court and the appellate court have concurrently found the accused guilty.

5. Mr. Gobinda Mukhoty, learned senior advocate appearing on behalf of the appellant directed a manifold scathing attack on the prosecution case raising the following contentions :

(1) The absence of any visible injury on the person of the appellant while apprehended belies the prosecution version that the appellant had fallen down from the vehicle on accelerating the speed;

(2) The fact that the Investigations Officer did not deliberately join with him respective inhabitants of the locality i.e. within the vicinity of the police outpost to witness the seizure but had taken pain to secure PW 1 and Connie D'Silva who were residing far away from the place of seizure and who seem to have been readily willing and obliging to be pancha witnesses devalues the evidence regarding the seizure of the contrabands and more so it is in violation of the salutary provisions of law prescribing the procedure to be followed before making the search and seizure;

(3) PW 7 sent only three samples from the alleged seized substances - that too in small quantity instead of sending sufficient representative quantity from each of the packets seized for assay. Therefore, in the absence of scientific test of all the substances found in each of the packets, no safe conclusion can be arrived that the entire substances seized under various packets were all prohibited drugs;

(4) The admission of PW 6 in her evidence that she does not know the difference between the narcotic drugs and psychotropic substances militates against the evidentiary value of her opinion under Ex. P.3.

(5) The non-inclusion of PW 5, the owner of the motorcycle as an accused and the non-examination of Cavin at whose instance PW 5 lent the vehicle are fatal to the prosecution case;

(6) Even assuming but not conceding that the prosecution version is acceptable in the absence of any evidence that the appellant was carrying on the nefarious trade of prohibited drugs either as a 'peddler' or 'pusher' the appellant would be liable to be punished within the mischief of Section 27(a) of the Act, since the attending circumstances present in this case indicate that the appellant was in possession of the drugs in small quantity only for his personal consumption.

6. We shall now examine the contentions seriatim with reference to the evidence available on record.

7. There is no denying the fact that the appellant had been taken into police custody in the early hours of December 7, 1987 by PW 7 along with the motorcycle involved in this case. The submission of Mr. Mukhoty is that in the absence of any injury on the person of the appellant, the case of the prosecution that the appellant fell down from his vehicle is hardly acceptable. No doubt if a person is thrown off or falls down from a speeding vehicle he may sustain injuries either serious or simple or escape sometimes unhurt but it depends on the speed of the vehicle, the manner of fall, the nature of the soil and the surface of the earth etc. In the present case, evidence of PWs 4 and 7 is that the appellant on seeing the police party accelerated the speed ignoring the signal given by PW 7 to stop and it was only during the course of this attempt, the appellant fell down from the motorcycle at a place where the street lights i.e. the fluorescent tubelights and bulbs were on and thereafter immediately stood up. The evidence of these two witnesses and the other connected facts lead to the inference that the appellant had fallen down immediately after he attempted to speed up the vehicle and was caught hold of by the police. It is not the case of the prosecution that the appellant sped away to some distance and then had fallen down from the speeding vehicle. PW 3, the Medical Officer attached to Hospicio Hospital speaks to the fact that when she examined the appellant on December 8, 1987 at about 8.00 p.m., the appellant complained of body ache, nausea etc. but PW 3 does not whisper of having seen any visible injury on the person of the appellant. After carefully scanning the evidence of PWs 4 and 7 coupled with the recovery of the articles MOs 1 to 14, we unhesitatingly hold that the appellant was caught by the police under the circumstances as put forth by the prosecution and the appellant however escaped unhurt. Hence in the light of the above evidence, we are constrained to hold that this submission made by the learned defence counsel does not merit consideration.

8. After the appellant was secured by the police, PW 7 directed PW 4 to bring two pancha witnesses. Accordingly, PW 4 brought two witnesses from a place which according to PW 7 is within a distance of 1 km. and according to PW 5 at five minutes walking distance. Much argument was advanced by the learned defence counsel that these two witnesses were not respectable inhabitants of that locality; that they were readily willing and obliging witnesses to the police and that there is deliberate violation of the statutory safeguard. This argument cannot be endured for more than one reason to be presently stated. The appellant was secured at midnight near the police outpost. It clearly transpires from the records that these two witnesses are not outsiders but residents of the same area, namely Colva. Except making some bare suggestions that both the witnesses were regular and professional witnesses, nothing tangible has been brought out in the cross-examination to discredit the testimony of PW 1. This Court while considering similar contention is Sunder Singh v. State of U. P. (1956 Cri LJ 801) and Tej Bahadur v. State of U. P. ((1970) 3 SCC 779) has observed that if pancha witnesses are not respectables of the same locality but from another locality, it may amount only to an irregularity, not affecting the legality of the proceedings and that it is a matter for courts of fact to consider and the Supreme Court would not ordinarily go behind the finding of facts concurrently arrived at by the courts below.

9. See also State of Punjab v. Wasson Singh ((1981) 2 SCC 1 : 1981 SCC (Cri) 292 : (1981) 2 SCR 615).

10. When such is the view, expressed by this Court on a number of occasions, we are unable to appreciate the submission of the learned counsel that the prosecution case is in violent disregard of the procedure relating to search and seizure. The question that PW 1 and other pancha witnesses are not the inhabitants of the locality does nor arise in the present case because it is indisputably shown that they are the residents of the same Colva area where the police outpost is situated. The fact that these two witnesses are not residing in the vicinity of the seizure, in our view, does not disturb the acceptance of the evidence of PW 1 relating to the seizure of the contrabands and other articles. With regard to the drawing up of the panchnama, the defence has come forward with two diametrically contradictory suggestions in that, the suggestion made to PW 1 is that he only subscribed his signatures on some papers whilst a new story, suggested to PW 7 is that the panchnama was fabricated around January 5, 1988 in order to save one Ramesh, brother of PW 5 from being prosecuted in connection with this seizure. To establish the seizure of all the articles including the contrabands, the prosecution rests its case not only on the testimony of PW 1 but also on the evidence of PWs 5 and 7 whose evidence is amply corroborated by the towering circumstances attending the case.

11. From the records, it is found that PW 7 divided the contrabands into three categories and sent the samples from each of the categories for analysis. No doubt, it would have been appreciable, had PW 7 sent sufficient representative quantity from each of the packets but however this omission in the present case does not affect the intrinsic veracity of the prosecution case. PW 6 has fairly stated that she was able to thoroughly assay only the substances found in two envelopes marked as Exs. P 1 and P 3 and the substances in envelope Ex. P 2 was not sufficient to carry out further analysis thought it was a dark brown soft mass having characteristic odour of opium. The testimony of PW 6 and her opinion recorded in the unimpeachable document (Ex. P 3) lend assurance to the case of the prosecution that the contrabands seized from the possession of the appellant were prohibited drugs and substances.

12. The criticism levelled by the learned defence counsel is that the evidence of PW 6 is not worthy of acceptance since she has admitted that the does not know the difference between the narcotic drugs and psychotropic substances. This attack, in our view, does not assume any significance because as rightly pointed out by Mr. Anil Dev Singh, the learned senior advocate for the respondent, the Medical Officer is not expected to know the differences in the legal parlance as defined in Section 2(xiv) and (xxii) and specified under Schedules I to III in accordance with the concerned Narcotic Drugs and Psychotropic Substances Rules, 1985 made under the Act and so this ground by itself, in our view, is no ground for ruling out the evidence of PW 6.

13. Yet another attack by the defence that the omission on the part of the prosecution to include PW 5 as an accused and to examine Cavin as a witness has to be mentioned simply to be rejected as devoid of any merit, as there is absolutely no material to hold that PW 5 was in any way connected with the seizure of the contrabands or he has committed any indictable offence though the vehicle belonged to him. The non-examination of Cavin at whose instance PW 5 lent his motorcycle to the appellant does not in any way affect the prosecution case.

14. From the discussions made above, we see no force in the contentions 1 to 5.

15. Lastly, we have to consider the legal submission made by Mr. Mukhoty that the appellant was in

possession of these drugs or substances in a small quantity for his personal consumption and as such he would be punishable only under Section 27(a) of the Act providing imprisonment for a term which may extend to one year or with fine or with both. He further pleaded that the appellant is neither an 'uncrowned king of the mafia world' nor a 'peddler' nor a 'pusher'; that he being a foreigner by prolonged and continuous use of drugs has become a drug-dependent and that he had all symptoms of an addict and exhibited sufferance of withdrawal symptoms on discontinuing the drug which, it seems, he was taking on his own as borne out from the testimony of the Medical Officers (PWs 2 and 3) under whose observation the appellant has been kept for some days. Incidentally, he has added that though ignorance of law is not an excuse and it cannot be permitted to be pleaded, yet this Court may take note of the fact that the appellant who is a foreigner should have been lacking awareness of the stringent provisions of the Act.

16. Firstly, let us examine whether the offence would fall within the mischief of Section 27(a) of the Act. This section provides punishment for illegal possession in small quantity for personal consumption of any narcotic drug or psychotropic substance. The expression 'small quantity' occurring in that section is explained under Explanation 1 annexed to that section which reads thus :

> For the purposes of this section 'small quantity' means such quantity as may be specified by the Central Government by notification in the official Gazette.

17. In compliance with this explanation, the Ministry of Finance (Department of Revenue) has issued Notification No. S.O. 827(E) dated November 14, 1985 published in the Gazette of India, Extra., Part II Section 3(ii) dated November 14, 1985 which notification reads thus :

> "In exercise of the powers conferred by Explanation 1 to Section 27 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (61 of 1985) and in partial modification of the notification of the Government of India in the Ministry of Finance, Department of Revenue No. S.O. 825(E), dated November 14, 1985 the Central Government hereby specifies the quantity mentioned in column 3 of the Table below, in relation to the narcotic drug mentioned in the corresponding entry in column (2) of the said Table, as 'small quantity' for the purposes of that section.
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> # TABLE Serial No. Name of the Narcotic Drug Quantity 1 2 3 1. Heroin or drug commonly known 250 milligrams as brown sugar of smack 2. Hashish or Charas 5 grams 3. Opium 5 grams 4. Cocaine 125 milligrams 5. Ganja 500 grams##

18. Coming to the case on hand, the appellant was found to be in possession of the narcotic drugs or substances far in excess of the quantity mentioned in column 3 of the table under the notification. According to the prosecution, he was in possession of 51 grams of brown sugar, 45 grams of ganja oil and 55 grams of opium.

19. In view of the above position, it cannot be contended that the prohibited drugs and substances seized from the appellant's possession were in small quantity so as to bring him only within the mischief of Section 27(a) of the Act.

20. It may not be out of place to mention that even if a person is shown to have been in possession of a small quantity of a narcotic drug or psychotropic substance, the burden of proving that it was intended for the personal consumption of such person and not for sale or distribution, lies on such person as per Explanation 2 of Section 27 of the Act.

21. Thirdly, the very fact that the appellant had kept these drugs and substances in many ingeniously devised places of concealment in the camera, shaving tube, torch and shoes would indicate that the appellant was having full knowledge that the drugs he carried were prohibited drugs and that he was having them in violation of law.

22. We, for the above reasons, see no merit in this contention also.

23. The trial court while inflicting the punishment has expressed its view about the drug menace spreading in Goa as follows :

> "The spreading of the drugs in Goa is becoming day by day a terrible menace which is completely destroying the very fibre of our society being also instrumental in subverting the tender soul of our young generation which is being badly contaminated by such danger in a very alarming proportions calling for severe punishment in case of illegal possession and transportation of drugs meant for personal consumption and eventual trade."

24. With deep concern, we may point out that the organised activities of the underworld and the clandestine smuggling of narcotic drugs and psychotropic substances into this country and illegal trafficking in such drugs and substances have led to drug addiction among a sizeable section of the public, particularly the adolescents and students of both sexes and the menace has assumed serious and alarming proportions in the recent years. Therefore, in order to effectively control and eradicate this proliferating and booming devastating menace, causing deleterious effects and deadly impact on the society as a whole, the Parliament in its wisdom, has made effective provisions by introducing this Act 81 of 1985 specifying mandatory minimum imprisonment and fine. As we have now rejected the plea of the defence holding that the penal provisions of Section 27(a) has no role to play as the prohibited drugs and substances possessed by the appellant were far in excess of the quantity mentioned in column 3 of the table under the notification, the sentence of 10 years rigorous imprisonment and the fine of Rs. 1,00,000 with the default clause as modified by the High Court does not call for interference.

25. In the result, the appeal is dismissed.

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