

(2006) 4 RCR(Criminal) 250

High Court Of Punjab And Haryana At Chandigarh

Case No: Criminal Appeal No. 216-DB of 2002

Basharat Ali and
another

APPELLANT

Vs

Inspector of Customs

RESPONDENT

Date of Decision: July 6, 2006

Acts Referred:

Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) â€” Section 22, 23

Citation: (2006) 4 RCR(Criminal) 250

Hon'ble Judges: Mehtab S. Gill, J; Baldev Singh, J

Bench: Division Bench

Advocate: Deepika Verma, Amicus curiae, for the Appellant; D.S. Sharma, for the Respondent

Final Decision: Dismissed

Judgement

Baldev Singh, J.

Basharat Ali alias Arshad son of Abbas Ali and Saugawat Ali son of Mohd. Hussain, both Pakistan nationals, residents of

village Bhainiya Daud, Tehsil and District Narowal (Pakistan) have filed this appeal through Superintendent, Central Jail, Amritsar. They were

convicted for the offences punishable under Sections 22 and 23 of the Narcotic Drugs and Psychotropic Substances Act, 1985 and u/s 3 of the

Indian Passport Act, vide impugned judgment dated 5.2.2002 passed by Shri Amarjit Singh Katari, the then Additional Sessions Judge-cum-

Judge, Special Court, Amritsar. Each of them was sentenced to undergo RI for a period of 20 years and to pay fine of Rs. 1 lac and in default of

payment of fine, to undergo further RI for 3 years u/s 22 of the Narcotic Drugs and Psychotropic Substances Act, 1985. Each of them was also

sentenced to undergo RI for a period of 20 years and to pay fine of Rs. 1 lac and in default of payment of fine, to undergo further RI for 3 years

u/s 23 of the Narcotic Drugs and Psychotropic Substances Act, 1985. Each of them was further sentenced to undergo RI for one year and to pay

Rs. 500/- as fine and in default of payment of fine, to undergo further RI for one month u/s 3 of the Indian Passport Act. All the sentences were

ordered to run concurrently vide impugned sentence order dated 5.2.2002. The period already spent in custody was ordered to be set off against

the substantive sentence.

2. Ms. Deepika Verma, Advocate was appointed as amicus curiae to argue the appeal on behalf of the appellants. Mr. D.D. Sharma, Advocate

represented the Inspector of Customs, Land Customs Station, Attari Rail, Amritsar complainant/respondent.

3. The facts of the prosecution case are that on 27.8.1997, Shri Rajan Chaudhary, Assistant Commissioner, Customs, Amritsar summoned Shri

G.M. Sharma, then posted as inspector Customs, Gurmit Singh, Superintendent Customs and Dharmender Kumar Inspector Customs to his office

and told them that there was a secret information that some Pakistanis would infiltrate into Indian territory carrying contraband items and that

Nakabandhi be made to capture them. Shri Rajan Chaudhary, Assistant Commissioner, Customs, Amritsar further directed that the Nakabandhi

be set up. After joining the Counter Intelligence Staff headed by Shri S.K. Sharma, Superintendent of Police. Then Nakabandhi was made on the

night of 27.8.1997 at about 11.45 p.m. near a tube-well, about 400 yards away from Ajnala-Ramdas road in the area of village Sammowal. At

about 3.30 a.m. (on 28.8.1997), the members of the Nakabandhi party noticed some movement at the Indo-Pak border. Some persons were

spotted coming from Pakistan side to Indian territory. When they came nearer, they saw that the infiltrators were three in number and they were

carrying something on their heads. They were challenged to stop. At this, they threw down the head loads and ran back towards Pakistan side.

The members of the Nakabandhi party chased them. Two of them (both the appellants) were apprehended, while the third infiltrator, whose name

was later on known as Ashique Ali succeeded in running away and could not be apprehended. Both the appellants told the members of the

Nakabandhi party that they were Pak nationals. Jarnail Singh Sarpanch and Balbir Singh Panch of village Sammowal were summoned at the spot.

Both the appellants were interrogated in the presence of PWs Jarnail Singh and Balbir Singh about their names, addresses and professions. Their

personal search was also conducted. No incriminating articles were recovered from the personal search of Basharat Ali alias Arshad-appellant.

One pistol, six live cartridges and a magazine were recovered from the personal search of Agawam Ali- appellant. Option was sought from the

appellants as to whether the bags carried by them were to be searched in the presence of a Magistrate or a gazetted officer. This option was given

orally at the spot. Due to darkness at the spot and for reasons of security, the appellants along with the sacks of their head loads were brought to

Customs office, Amritsar. Jarnail Singh Sarpanch and Balbir Singh Panch also accompanied the officials of the Customs Department and the

Intelligence Department. After reaching the Customs office at Amritsar, consent memo of appellant Basharat Ali Ex. PA and consent memo of

Saugawat Ali Ex. PB were prepared. They consented for search before a gazetted officer. Both the appellants thumb marked their consent memo.

These were attested by Gurmit Singh, Superintendent Customs. Two of the bags recovered were opened and were found containing 48 packets,

each having 1 Kg. of Heroin. The bags bore the mark of Sugar Factory of Pakistan. Recovery memo Ex. PC was signed by G.M. Sharma,

Karambir Singh SI, Gurmit Singh Superintendent Customs and were thumb marked by Jarnail Singh and Balbir Singh, independent witnesses.

These were also thumb marked by the appellants. All the 48 packets were opened. Their substance was tested with the help of Drug Testing Kit,

available with the Customs officials. They all tested positive for Heroin. 48 packets were converted into 5 lots/blocks i.e. 4 each containing 10

packets and the 5th containing 8 packets. Out of the first lot of 10 packets, 100 gms contents of each of the 10 packets were taken out and the

same were mixed and made homogeneous and out of the homogeneous mixture, three samples of 10 gms were taken out. The remaining

homogeneous mixture was put in the same packets from which it was taken out. All the three samples and the packets containing the remaining

contents were converted into sealed parcels, bearing seal impression No. 144 of the Customs office. In the same manner, sampling and conversion

into sealed parcels was done of the remaining 4 lots and total 15 representative samples were taken out. On opening the third bag, opium was

recovered in 10 packets; each containing 500 gms approximately. 50 gms of opium was taken out from each of the packets and a homogeneous

mixture was prepared and out of it, three samples, each of 15 gms were separated and remaining homogeneous mixture was transferred into the

same packets. The samples and the packets were converted into sealed parcels bearing seal impression No. 144 of the Customs Office. A

composite weightment sheets was prepared, which was signed by G.M. Sharma, Customs Inspector and other witnesses. The same is Ex. PD.

Before sealing the sample parcels, slips bearing the thumb marks of the appellants and signatures of Karambir Singh SI and G.M. Sharma Customs

Inspector were affixed thereon. All the parcels were then put into two steel trunks. The steel trunks were sealed after wrapping clothes around

them. Similarly, Mouser pistol and cartridges were also sealed into parcels. A Panchnama Ex. PE was prepared. It was signed by G.M. Sharma,

Customs Inspector and Karambir Singh SI. It was also thumb marked by Jarnail Singh and Balbir Singh, independent witnesses. Arrest memo Ex.

PG and memo of personal search Ex. PH were prepared. The case property was deposited with the Inspector, in-charge Malkhana, Customs office, Amritsar.

4. On 28.8.1997, Basharat Ali made statement, which was recorded by Rajender Singh Inspector. It was made in the presence of G.M. Sharma,

Customs Inspector and Shri M.S. Harchand, Superintendent Customs. Saugawat Ali also made statement on 28.8.1997, which was recorded by

Rajender Singh, Superintendent and was signed by M.S. Harchand, Superintendent Customs. Both the appellants made statements voluntarily

admitting that they had crossed over to Indian territory from Pakistan without valid documents.

5. On 29.8.1997, both the appellants along with the recovered incriminating articles and the samples were produced before Judicial Magistrate 1st

Class, Amritsar. The case property was then deposited in the Malkhana. They were remanded to Customs custody for interrogation.

6. On 2.9.1997, both the appellants voluntarily made statements before Gurmit Singh Superintendent Customs and M.S. Harchand,

Superintendent Customs. They admitted that the contraband articles were recovered from them.

7. On 2.9.1997, Shri P.P. Singh Inspector Customs took the samples along with forwarding letter to the Chemical Examiner, New Delhi. The

samples were deposited there on 3.9.1997.

8. On 3.11.1997, report of the Chemical Examiner, New Delhi was received, which declared the samples to be of Heroin and Opium, which were

covered under the Narcotic Drugs and Psychotropic Substances Act, 1985.

9. Shri G.M. Sharma Inspector Customs then filed complaint in the court of Chief Judicial Magistrate, Amritsar for prosecution of both the

appellants for the offences punishable under Sections 22 and 23 of the Narcotic Drugs and Psychotropic Substances Act, 1985 and u/s 3 of the

Indian Indian Passport Act and Section 25 of the Arms Act.

10. The case was committed by the Chief Judicial Magistrate, Amritsar to the court of Session. It was then entrusted for trial to the court of

Additional Sessions Judge-cum-Judge, Special Court, Amritsar.

11. Both the appellants were charged for the offences punishable under Sections 22 and 23 of the Narcotic Drugs and Psychotropic Substances

Act, 1985 and u/s 3 of the Indian Indian Passport Act. They did not plead guilty to the charge and claimed trial. No charge was framed u/s 25 of

the Arms Act, because sanction to prosecute the appellants was not received as envisaged u/s 39 of the Arms Act.

12. The prosecution at the trial examined four witnesses, namely, PW1 G.M. Sharma, Inspector Customs, PW2 Rajender Singh, Superintendent

Customs, PW3 Gurmit Singh, Superintendent Customs and PW4 Sandeep Prabhakar, Inspector Customs. PWs Dharmender Kumar and Mangal

Singh were given up as unnecessary witnesses. PWs Jarnail Singh Sarpanch and Balbir Singh Panch, both independent witnesses were given up as

won over by the appellants.

13. Statements of both the appellants were recorded u/s 313 of the Code of Criminal Procedure on the conclusion of the prosecution evidence.

They stated that they were innocent. The contraband articles were not recovered from them. They are shepherds. Their village is just on the Indo-

Pak border. There was flood in the Ravi river. Their cattle entered the Ravi river. They entered the river to save them and floated in the river water

and came into Indian territory. They were not aware of the Indo-Pak border line. They were picked up while in the Indian territory by the Customs

officials, They were kept at different places. They were given beatings and were involved in this false case. Their thumb impressions were obtained

on blank papers. They, however, adduced no evidence in defence.

14. The Trial Court had framed the following points for determination :

Points for determination :

1. Whether the Seizing Officer complied with the provisions of Section 42 of the Act before effecting recovery from the accused.
2. Whether the case of the prosecution is improbable.
3. Whether the accused have been falsely implicated to get reward by planting unclaimed narcotic material upon them.
4. Whether there is sufficient evidence on record for bringing home guilt to the accused.

The Trial Court determined under Point No. 1 that the secret information was not definite and was not against the appellants. Hence, it was not

reduced into writing and it was consequently not required to be conveyed to the superior officers, as laid down u/s 42 of the Narcotic Drugs and

Psychotropic Substances Act, 1985. It was determined by the Trial Court under point No. 2 that the prosecution version is not improbable. It was

determined under point No. 3 that the appellants were not falsely implicated in this case. They are Pak nationals. It was determined under point

No. 4 that the prosecution evidence was more than sufficient for bringing home guilt to the appellants.

15. Arguments of the Ld. Counsel for the parties were heard and the evidence was scrutinized with their help.

16. The first and foremost contention of the Ld. Counsel for the appellants is that the Customs officials violated the provisions of Section 42(2) of

the Narcotic Drugs and Psychotropic Substances Act, 1985 and as such the alleged recovery is vitiated. It was argued that prior information was

received that some Pakistanis would infiltrate into the Indian territory carrying some contraband articles and this information after taking it down in

writing was not sent forthwith to the immediate superior officials. Section 42(2) of the Narcotic Drugs and Psychotropic Substances Act, 1985

reads as under :

42(2)..... Where an officer takes down any information in writing under sub-section (1) or records grounds for his belief under the proviso thereto,

he shall within seventy two hours send a copy thereof to his immediate official superior.

17. In this case the facts are peculiar. On 27.8.1997, Shri Rajan Chaudhary, Assistant Commissioner, Customs, Amritsar summoned G.M.

Sharma Inspector, Customs, Gurmit Singh Superintendent, Customs, Dharmender Kumar Inspector and other officials in his office and told them

that some Pakistani infiltrators would infiltrate into Indian territory carrying contraband articles and Nakabandhi was to be made. Shri Rajan

Chaudhary, Assistant Commissioner, Customs, Amritsar was the immediate superior officer and he had the information already with him. He rather

passed on the information to G.M. Sharma, Customs Inspector, Gurmit Singh Superintendent Customs and other officials of the Customs

Department. Section 42(2) of the Act as reproduced above would not apply in this situation. Shri G.M. Sharma, Customs Inspector, who had

lodged complaint in this case had not taken down in writing any information of its own u/s 42(1) of the Narcotic Drugs and Psychotropic

Substances Act, 1985. So, he was not required to send copy of any information to his immediate superior officer u/s 42(2) of the Narcotic Drugs

and Psychotropic Substances Act, 1985. No prejudice, therefore, has been caused to the appellants. There is no presumption that prejudice is

caused for not complying with the provisions of Section 42(2) of the Narcotic Drugs and Psychotropic Substances Act, 1985. This presumption

like other presumptions would be rebuttable. The trial would not be vitiated on this score alone. The Ld. Counsel for the appellants cited the case

of Balwant Singh @ Banta v. State of Punjab, 2001 (3) RCR (Crl.) 802. The facts of the case referred to above were different. So, this authority

does not apply to the facts of the case in hand.

18. The next contention of the Ld. Counsel for the appellants is that it was not put to the appellants in their statements recorded u/s 313 Criminal

Procedure Code that they were in conscious possession of the Heroin and the Opium. Hence, they are entitled to be acquitted on this score. The

Ld. Counsel for the appellants referred the case of Raj Kumar v. State of Punjab, 2005 (1) RCR (Crl.) 70. The facts of this case were different

from the case in hand. In the above referred case, the opium was recovered from the Jeep. A bag was lying between the seats of Raj Kumar and

Hawa Singh. Under these circumstances, it was the duty of the prosecution to prove as to in whose conscious possession the bag was lying. In the

case in hand, the appellants were apprehended in nocturnal darkness, when they had thrown down the bags being carried on their heads on being

challenged by the members of the Nakabandhi party. Since, they were carrying the bags containing the contraband Heroin and Opium, it was in

their conscious possession. All the incriminating evidence was put to them, while recording their statements u/s 313 Criminal Procedure Code. No

prejudice has been caused to them, if the word ""conscious"" was not referred to in the statements.

19. The Ld. Counsel for the appellants argued that both the independent witnesses Jarnail Singh Sarpanch and Balbir Singh Panch had not been

examined. They were given up on facile plea of having been won over by the appellants. The only inference is that they were not going to support

the prosecution case and hence, they were given up. However, it is to be seen, whether for their non-examination, the alleged recovery is proved

beyond reasonable doubt or not. We have scanned through the evidence of PW1 G.M. Sharma Inspector Customs, PW2 Rajender Singh

Superintendent Customs, PW3 Gurmit Singh Superintendent Customs and PW4 Sandeep, Prabhkar Inspector Customs. They were cross-

examined at length. Nothing has emerged out, which may shake their credibility. Their evidence receives credence even without any corroboration

from independent witnesses. Both the appellants are Pak nationals. The Customs officials have no enmity against them, so, as to falsely implicate

them in this case. Opium and Heroin have been recovered from them in heavy quantity, which rules out their false implication. The monetary value

of the contraband articles runs into crores of rupees and it is not probable that such valuable contraband articles could be implanted against them.

The appellants took the plea in their statements recorded u/s 313 Criminal Procedure Code that they entered the Indian territory by floating into

the Ravi river in a bid to save their cattle. There is no evidence to substantiate this plea. The prosecution version does not get improbabilised from

the mere fact that the third companion of the appellants succeeded in running away. It was darkness. The Customs officials chased him for about

300 yards. They were armed, but they did not fire at him. So, there is nothing suspicious about the prosecution version if their third companion

(Ashique Ali) effected his escape by running from the spot.

20. The next contention of the Ld. Counsel for the appellants is that the sample in this case was sent on 2.9.1997. The contraband articles were

captured on the night intervening 27/28.8.1997. The reports of the Chemical Examiner were received on 3.11.1997, which declared the samples

that of Heroin and Opium. There was no inordinate delay in dispatching the samples to the Chemical Examiner, New Delhi. There is no evidence

that the samples were tampered with. These were safely kept in the Malkhana of the Customs Department. It was also argued that the seal was

not handed over to the independent witnesses, though they were available. This would not also vitiate the alleged recovery.

21. The evidence on the file reveals that the appellants made confessional statements before the Customs officials, which are Exhibits PE and PK,

wherein, they admitted that the contrabands Opium and Heroin were recovered from them and they tress-passed into the Indian territory, in the

circumstances as alleged by the prosecution. These confessional statements were voluntarily made. These are admissible u/s 108 of the Indian

Customs Act. Conviction can be made on their basis alone. The appellants for the first time came up with the plea that their thumb impressions

were obtained on blank papers and they did not make any confessional statements, while making their statements u/s 313 Criminal Procedure

Code. Earlier to it, they moved no application taking up such a plea. They also appeared several times before the Trial Court and they did not

agitate this point. So, their plea that their statements were fabricated as their thumb impressions were obtained on blank papers is not tenable. The

case of K.I. Pavunny v. Assistant Collector, Central Excise Collectorate. Cochin, 1997 (2) RCR 48 (SC) is referred here. The Apex Court laid

down that Custom Officer is not a Police Officer, nor is he empowered to file charge-sheet u/s 173 Criminal Procedure Code. Even though,

Customs Act gives power of arrest, investigation and search to Custom Officers, they do not become Police Officers within the meaning of Section

25 of the Evidence Act. Hence, confessional statement made by accused before Customs Officer is admissible in evidence. Further, it was laid

down that there is no prohibition under the Evidence Act to rely upon re-tracked confession to prove prosecution case, if the court on examination

of evidence finds that the retracted confession is true, that part of the inculpatory portion can be relied upon to base conviction. However,

prudence and practice required that court would seek assurance getting corroboration from other evidence adduced by the prosecution. It was

further laid down that confession can form sole basis for conviction if it is proved by unimpeachable evidence and if it is of voluntary nature. In this

case, the evidence of the prosecution witnesses is unimpeachable. The confessional statements were not obtained by threat duress or coercion.

Hence, these can be relied upon to be the basis for conviction of the appellants.

22. The Ld. Counsel for the appellants submitted that in the event of upholding the conviction of the appellants, lenient view be taken against them

regarding sentence. Each of the appellants has been sentenced to undergo RI for a period of 20 years and to pay fine of Rs. 1 lac and in default of

payment of fine to further undergo RI for 3 years u/s 22 of the Narcotic Drugs and Psychotropic Substances Act, 1985. Further each of them has

been sentenced to undergo RI for a period of 20 years and to pay fine of Rs. 1 lac and in default of payment of fine, to undergo further RI for 3

years u/s 23 of the Narcotic Drugs and Psychotropic Substances Act, 1985. Each of the appellants is also sentenced to undergo RI for one year

and to pay Rs. 500/- as fine and in default of payment of fine to undergo further RI for one month u/s 3 of the Indian Indian Passport Act. All the

substantive sentences were ordered to run concurrently. The appellants are poor shepherds. They are carriers of the contraband narcotics

recovered from them. They are family men and have wives and children to support. Hence, we reduce the sentence of imprisonment from 20 years

each under Sections 22 and 23 of the Narcotic Drugs and Psychotropic Substances Act, 1985 to RI for 12 years. The sentence of fine and the

defaulting clause under Sections 22 and 23 of the Narcotic Drugs and Psychotropic Substances Act, 1985 and the sentence of imprisonment and

fine u/s 3 of the Indian Indian Passport Act would remain the same. All the substantive sentences shall run concurrently. The period already spent

in custody during investigation, trial and pendency of the appeal would be set off against the substantive sentences awarded to them. Except for the

above modification in the sentence order, the appeal fails and the same is dismissed.