

(2013) 07 P&H CK 0873

High Court Of Punjab And Haryana At Chandigarh**Case No:** C.R.A. No. 1192-DB of 2010

Mohammad Rashad and Others

APPELLANT

Vs

Inspector of Customs

RESPONDENT

Date of Decision: July 4, 2013**Citation:** (2013) 4 RCR(Criminal) 62**Hon'ble Judges:** Ritu Bahri, J; Hemant Gupta, J**Bench:** Division Bench**Advocate:** Vaibhav Narang, Vineet Sharma, Aman Dhir and Ms. Smriti Dhir, for the Appellant; D.D. Sharma, for the Respondent

Judgement

Hemant Gupta, J.

The instant appeal is preferred by Mohammad Rashad son of Yasin Muhammad, Nasreen Akhtar and Jamir @ Manu against the judgment of conviction and order of sentence dated 16.10.2010 passed by the Additional Session Judge, Amritsar, vide which appellants namely Mohammad Rashad and Nasreen Akhtar were convicted for the offences punishable under Sections 21, 23 & 29 of the Narcotic Drugs & Psychotropic Substances Act, 1985 (hereinafter called as "the Act") and sentenced to undergo rigorous imprisonment for a period of 15 years and to pay a fine of Rs. 1,50,000/- on each count, whereas appellant Jamir @ Manu was convicted for an offence punishable u/s 29 of the Act and sentenced to undergo rigorous imprisonment for a period of 15 years and to pay a fine of Rs. 1,50,000/-. In default of payment of fine, the appellants were ordered to undergo further rigorous imprisonment for a period of one year. It has come on record that one of the appellants namely Nasreen Akhtar has preferred separate appeal bearing CRA No. 527-DB of 2011. Since the said appellant has already filed the present appeal along with other co-accused, therefore, no separate orders are called for in CRA No. 527-DB of 2011.

2. The prosecution case is that on 08.05.2006 at about 2.30/3.00 PM, appellants No. 1 & 2, who are the Pakistani Nationals, entered India through Samjhauta Express at

Land Custom Station, Attari Rail Station. After clearance of immigration formalities, both of them having common gate pass reported for customs clearance at Counter No. 1, where Inspector Customs Rajesh Sarswat was officiating the clearance duty and Shri J.S. Gill, Superintendent was supervising the clearance of passengers. Inspector Customs Rajesh Sarswat noticed some false cavities in the two leather bags being carried by the accused. On suspicion, two independent witnesses namely Jasbir Singh and Kulwant Singh were called at the spot. Shri J.S. Gill, Superintendent disclosed his identity to both the accused and apprised them about their legal right to be searched in the presence of a Gazetted Officer or Magistrate. He also gave the option to the accused in this regard. Both the accused opted to be searched in the presence of a Gazetted Officer. The examination of their baggage was done in the presence of Shri Gill and the above mentioned witnesses. During the course of checking of leather bags, the false cavities were found in the inner side of the bags. Such cavities were cut opened with knife as a result of which 8 poly bags containing brownish white powder was recovered and on weighment, the same was found to be 2.610 Kilogrammes. During the course of search of third bag, two small cloth bags (guthis) containing two big size capsules were recovered. From the personal search of Mohammad Rashad, 35 capsules, which were concealed in pant and inner clothes worn by him, were recovered. During the personal search of appellant No. 2 Nasreen Akhtar, which was conducted by lady Inspector Customs Neena Sood in the presence of independent witness Smt. Devi, 40 small size capsules concealed in her inner clothes and hair band were recovered. 1.090 Kilogrammes net heroin was recovered from these 77 capsules (75 small and 2 big) when cut opened with knife. 8 small poly bags containing 0.485 Kilogrammes of heroin were also recovered from the false cavities in the sandals worn by Nasreen Akhtar. The total quantity of heroin recovered from both the accused came out to be 4.185 Kilogrammes net. The recovered material was tested with the drug testing kit and the same was found positive for heroin. Three representatives of 5 grams each were taken from each lot and in total nine samples were prepared and sealed with the seal No. 152 of Custom Division Amritsar. Thereafter, the statements of appellants No. 1 & 2 u/s 67 of the Act and 108 of the Customs Act were recorded. In pursuance of such statements, the Customs Officials searched the house of appellant No. 3 Jamir @ Manu at Delhi and brought him to Amritsar and his statement u/s 67 of the Act and 108 of the Customs Act was also recorded. After completion of investigations, a complaint for the offences under Sections 8, 21, 22, 23, 29 & 30 has been filed before the Special Judge constituted under the Act on 02.08.2006.

3. During trial, the prosecution apart from tendering documents, examined Inspector Customs Rajesh Sarswat as PW-1; Inspector Customs Neena Sood as PW-3; Shri Piara Ram, Superintendent Customs as PW-4; Shri A.S. Bajwa, Superintendent Custom Freight Station, Jalandhar as PW-5; Inspector Customs Dhiren Senapati as PW-6; Shri Subash Chander, Superintendent Customs as PW-7; Inspector Customs Ranjit Kumar Gupta as PW-8 and Inspector Bhuvneshwar Mishra as PW-9. The

incriminating circumstances appearing against the accused were put to them while recording their statements under Sections 313 Cr.P.C. The appellants denied all the allegations and pleaded false implication. In defence, they examined DW-1 Ajit Singh, Criminal Ahlmad, who has brought the original file pertaining to case No. 122 dated 02.08.2006/28.02.2008 titled as "Inspector Customs v. Rushida Bibi" decided on 26.07.2008.

4. After considering the testimonies of all the witnesses as well as the documents produced on record, the learned Additional Sessions Judge convicted and sentenced the appellants in the manner mentioned above.

5. PW-1 Rajesh Sarswat, Inspector Customs, while appearing in the witness box, supported the prosecution case as set out in the complaint in its entirety. He deposed that appellants No. 1 & 2 namely Mohd. Rashad and Nasreen Akhtar reported for custom clearance at Counter No. 1 at Land Customs Station, Attari Rail after completion of immigration formalities along with their baggage consisting of two leather bags and other miscellaneous articles, which were tied in a cloth piece. Shri J.S.Gill, Superintendent Customs was supervising the clearance of the passengers. He apprised both the accused of their legal right that whether they wanted to get their personal search in the presence of a Gazetted Officer or a Magistrate. Both the accused opted to be searched in the presence of a Gazetted Officer. He proved option and consent memo Exs. P1 and P2, which bears his signatures. He deposed with regard to the recoveries affected by him. He also proved Panchnama Ex.P5 bearing his signatures and that of witnesses and accused. He also proved the recovery-cum-seizure memo Ex.P6, which also bears his signatures and that of the witnesses and the accused. He deposed that seal after use was handed over to the competent authority. The witness also proved the statements of the accused recorded u/s 67 of the Act and 108 of the Customs Act. He further deposed that due cautions was given to both the accused before recorded their statements that the same can be used against them before the Court of law. He deposed that no threat, pressure was exercised upon the accused while recording their statements. He deposed that both the accused along with case property were produced before the Duty Magistrate on 09.05.2006. On 10.05.2006, supplementary statements of both the accused were recorded u/s 67 of the Act and u/s 108 of the Customs Act, 1962. He deposed that all the case property including the seized samples was deposited with Shri Bhuvnesh Mishra, Inspector Malkhana of Custom House, Amritsar on 10.05.2006 vide inventories Exs.P-19 to P-21. He deposed that the case property was not tampered with during the period of his custody. In his cross-examination, PW-1 denied that Jamir accused or any other accused never made any voluntary statement. He stated that the accused were giving answers in Punjabi language to the questions asked. He denied that the signatures of Nasreen Akhtar were procured on blank papers and on some written papers on an assurance that she will be let off later on. He denied that her (Nasreen Akhtar) signatures were procured under threat.

6. PW-2 Ms. Neena Sood is the witness, who carried out the personal search of accused-appellant No. 2 (Nasreen Akhtar) in the presence of an independent witness Devi in x-ray room adjoining the counter and recovered 40 capsules from her inner clothes and hair band. She deposed that the search of sandals were conducted at the counter. In her cross-examination, she stated that personal search was conducted at 8.00 PM.

7. PW-3 is J.S. Gill, Superintendent Customs, who was supervising the clearance of passengers. He deposed that appellants No. 1 & 2 were having a joint gate pass. He deposed that the accused were carrying two leather bags and one rexine bag. False cavities were noticed in the leather bags. He also deposed about the manner of search and recoveries as stated by PW-1 Rajesh Sarswat. He deposed that statement of Mohd. Rashad was recorded in his presence by Inspector Narinder Mohan after giving due caution that the same can be used in the Court of law and no threat, pressure was exercised upon the accused while recording the statement. In his cross-examination, he stated that both the accused were having common baggage and common gate pass and that name of Mohd. Rashad has been mentioned on the gate pass, but the number of passengers is mentioned as two. He denied the suggestion that neither any recovery has been affected from the accused nor they had made any volunteered statement. He also denied the suggestion that the signatures were procured under threat and that no person by the name of Jasbir Singh, Kulwant Singh or Devi exists or their fictitious signatures have been written on documents.

8. PW-4 Piara Ram, Superintendent Customs while appearing in the witness box has deposed that on 08.05.2006, the statement of Nasreen Akhtar was recorded u/s 67 of the Act and 108 of the Customs Act by Inspector Anoop Kumar. In his cross-examination, he denied the suggestion that the signatures of the accused (Nasreen Akhtar) were procured on blank papers or that signatures were procured by giving her allurements that she will be let off.

9. PW-5 is Shri A.S. Bajwa, Superintendent Customs, who proved the statement Ex.P18 of Jamir accused recorded u/s 67 of the Act and Section 108 of the Customs Act on 13.05.2006.

10. PW-6 Dhiren Senapati, Inspector is the witness, who deposed regarding the safe custody of the samples from the time it was handed over to him by Inspector Rajesh Sarswat on 16.05.2006 till the time the same were delivered to the Laboratory for chemical examination.

11. PW-7 is Shri Subhash Chander, Superintendent Customs, who deposed that he received a fax message from Shri Z.R. Kambli, Deputy Commissioner, Customs, LCS Attari Rail, Amritsar and also a corresponding phone message from Shri M.M. Dubey, Additional Commissioner of Customs, Preventive, Delhi on 08.05.2006. He deposed that the search of premises of Jamir was carried out and nothing

incriminating was recovered. Thereafter, on the basis of summons, statement of Jamir @ Manu was recorded u/s 67 of the Act and u/s 108 of the Customs Act. He deposed that in his statement, Jamir admitted that accused Mohd. Rashad is coming with heroin which was to be delivered at his residence and was to be handed over to Nasir Ali and as per their directions and the place of delivery was to be intimated by their person working in India for them on consideration of Rs. 2000/- per parcel. He also admitted that he was fully aware and having full knowledge of heroin coming from Pakistan, receipt and delivery to another persons and also admitted that he was having full knowledge that involvement in drug trafficking i.e. sale, purchase, receipt and delivery. He deposed that subsequently another statement (Ex.P42) was recorded u/s 67 of the Act and u/s 108 of the Customs Act on 10.05.2006.

12. PW-8 is Ranjit Kumar Gupta, who arrested the accused Jamir@ Manu on 10.05.2006. PW-9 is Inspector Bhuvneshwar Mishra, who was posted as Incharge Malkhana Custom House, Amritsar on 10.05.2006. He deposed that on that date, Shri Rajesh Sharswat, Inspector Customs deposited with him one tin box sealed with seal No. 152 of Customs Division containing 4.140 Kilogrammes heroin along with Indian currency and personal effect. He deposed that till the case property remained with him, neither he tampered nor allowed anybody to tamper with it.

13. Learned counsels for the appellants have raised the similar arguments; as were raised by the appellants in CRA No. 11-DB of 2010 titled "Fatima Bibi w/o Safi Safe v. Inspector of Customs" decided on 26.03.2013 by this Bench. In the aforesaid case also, two Pakistani Nationals entered India through Samjhauta Express at Land Custom Station, Attari Rail Station on the same day i.e. 08.05.2006 and heroin was recovered from each one of them. In the aforesaid case, Mohd. Rashad - appellant No. 1 appeared as defence witness. In view of the said judgment, in fact, the learned counsel for the appellants stated that nothing more is required to be argued by them. Therefore, since the arguments are similar and having identical facts, we do not find any merit in the present appeal for the reasons recorded in Fatima Bibi's case (supra).

14. However, an additional argument was raised that appellants No. 1 & 2 have retracted from the statements so recorded by the Custom Officers at the earliest opportunity. We do not find any merit in the argument raised. Appellants No. 1 & 2 were produced before the Magistrate on 09.05.2006. There is no assertion on behalf of both the appellants that their statements have been recorded by the Customs Officials under any threat. No grievance was made in respect of recording of any statement by the Custom Officials by force or threat. It was only in the first application for bail filed by Nasreen Akhtar on 25.08.2006, appellant No. 2 has averred that she has not tendered any voluntarily statement to the custom department and if there is any statement, it is dictated by the department to suit them for implication of the false case against them. The suggestions put to the prosecution witnesses in the cross-examination are general in nature and do not

substantiate the allegations of threat, coercion or misrepresentation in the recording of lengthy statements running into five to six pages and each page having been signed by the appellants. The plea of retraction from statements is, thus, an after thought. In the absence of any conclusive evidence, such statements cannot be brushed aside.

15. The Hon'ble Supreme Court in a judgment reported as [K.I. Pavunny Vs. Assistant Collector \(HQ\), Central Excise Collectorate, Cochin](#), has held that burden is on the accused to prove that the statement was obtained by threat, duress or promise like any other persons. If it is established from the record and circumstances that confession was surrounded with suspicious, then it falls in the realm of doubt. In the present case, in the absence of any specific material regarding threat, coercion or misrepresentation, the suggestions put to the prosecution witnesses during their cross-examination alone are not sufficient for the appellants to retract from their statements made before the Custom Officers.

16. However, in respect of appellant No. 3, it is argued that he is an Indian National living in Delhi and no recovery of any contraband has been effected from him. Therefore, in the absence of recovery of any contraband, the statements of appellants recorded u/s 67 of the Act and u/s 108 of the Customs Act would not be sufficient to maintain conviction of appellant No. 3 for an offence u/s 29 of the Act.

17. We have heard learned counsel for the appellants at length in respect of conviction of appellant No. 3 for an offence punishable u/s 29 of the Act. Section 29 of the Act contemplates that whoever abets or is a party to a criminal conspiracy to commit an offence punishable under Chapter IV of the Act, then notwithstanding anything contained in Section 116 of the Indian Penal Code, such person shall be punishable with the punishment provided for the offence.

18. No doubt no recovery of any contraband has been effected from appellant No. 3, but for an offence punishable u/s 29 of the Act, the recovery of contraband is not necessary. The statement of Jamir in respect of visits of Mohammad Rashad and Nasreen Akhtar is corroborated by the entries in the passport recovered by the prosecution during the investigation. Jamir has admitted his acquaintance with the accused, but asserted that it is his first attempt in dealing heroin.

19. Appellants No. 1 & 2 had brought heroin to India for sale in India. Such sale necessarily required to be carried out with the assistance of an Indian National and such support system was provided by appellant No. 3. Therefore, he has been rightly convicted for an offence punishable u/s 29 of the Act.

20. However, we find that the appellant Fatima Bibi in CRA No. 11-DB of 2010 and her sister Mumtaz were convicted for the offences punishable under Sections 21 & 23 of the Act and sentenced to undergo rigorous imprisonment for a period often and half years and to pay a fine of Rs. 1 lac on both counts. Though the appellants herein have been convicted for the offence punishable under Sections 21, 23 & 29 of

the Act, but in respect of much larger quantity of heroin, we find that in the matter of sentence, the appellants should be sentenced to the same sentence as was imposed upon the appellants in CRA No. 11-DB of 2010. Consequently, while maintaining the conviction of the appellants, we modify the sentence imposed upon the appellants to that of ten and half years and to pay a fine of Rs. 1 lac on each count. In the event of default of payment of fine, the appellants shall further undergo rigorous imprisonment for a period of one year.

With the said modification in the sentence, the appeal stands disposed of.