

Kusum Vs State

Court: Delhi High Court

Date of Decision: Sept. 22, 2014

Acts Referred: Criminal Procedure Code, 1973 (CrPC) â€” Section 313
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) â€” Section 15, 42, 42(2), 50

Hon'ble Judges: Indermeet Kaur, J

Bench: Single Bench

Advocate: Vimal Puggal, Advocate for the Appellant; Navin K. Jha, APP, Advocate for the Respondent

Final Decision: Allowed

Judgement

Indermeet Kaur, J.

This appeal is directed against the impugned judgment and order of sentence dated 04.5.2006 and 06.5.2006

respectively wherein the appellant Kusum had been convicted u/s 15 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act)

for having been found in unlawful possession of 12 kilograms of Poppy Straw. She had been sentenced to undergo RI for a period of 4 years and

to pay a fine of Rs.20,000/-, in default, to undergo SI for 6 months.

2. The version of the prosecution is that SI Nalin Verma (PW-10) received a secret information that a lady would be selling ""Chura Post"" (Opiate

Powder) at Majnu Ka Tila, New Delhi. PW-10 informed the SHO, Inspector Surinder Kumar Sand (PW-4) as also the ACP of PS Civil Lines

about this information. This information was recorded in a DD. Copy of this DD was handed over to Constable Balbir (PW-5) who was directed

to take this information to the residence of the ACP and deliver it to him. PW-10 along with Head Constable Sushil Kumar (PW-9) reached the

spot. Passersby were asked to join the raiding party; none agreed. At about 8.35 p.m. SHO Inspector Surinder Kumar (PW-4) along with

woman Head Constable Veena (PW-7) reached the spot. At about 08:45 PM, a lady was seen carrying a plastic bag coming from bus stand from

the side of Punjabi Basti, going towards Majnu Ka Tila. At the pointing out of the secret informer the lady was stopped. She disclosed her name as

Kusum @ Kusmi. PW-10 introduced himself and informed her that she was suspected to be in possession of "Chura Post". Her search was

conducted. She was informed that search of the members of the raiding party could be carried out in her presence. She was also informed about

her legal right to get her own search conducted before a Magistrate or Gazetted Officer. Notice u/s 50 of the NDPS Act (Ex.PW-10/A) was

served upon her. She answered in writing on the same document that she did not wish to be searched before a Gazetted Officer or Magistrate.

From the plastic bag which she was carrying in her hand, ""Chura Post"" was recovered which was weighed on the weighing scale and measured to

be 12 kg. One sample of 1 kg was prepared. The remaining ""Chura Post"" was put back into the parcel. The contraband was seized and thereafter

sealed, and the seal of NV was fixed. The FSL Form was filled in. The seal after use was handed over to H.C. Sushil Kumar. The rukka (Ex.PW-

10/B) was dispatched through H.C. Sushil Kumar and the FIR was registered. The case property was deposited in the Malkhana with H.C.

Satender Singh (PW-1) and entry at serial No. 304 in Register 19 in the Malkhana was made and proved as Ex.PW-1/A. On 15.7.2003 this

sealed parcel, along with CFSL Form, was handed over to Constable Jitender Kumar (PW-6) who deposited it in FSL Malviya Nagar which vide

its report Ex.PX had tested the sample contraband and found it positive for the main constituents of Poppy Plant.

3. Ten witnesses were examined on behalf of the prosecution. In view of the oral and documentary evidence adduced by the prosecution, the

appellant was convicted and sentenced as noted supra. In her statement recorded u/s 313 of the Cr.PC, the appellant had stated that the case

against her was false and fabricated, and that she was innocent. She did not lead any defence evidence.

4. On behalf of the appellant arguments have been heard in detail. At the outset, it is pointed out that the appellant was a young girl aged 19 years

at the time of the incident who has attained the age of 33 years. She is living a life wholly away from crime. It has also been pointed out that

keeping in view the sentence awarded to her, and also keeping in view the fact that she is living with her aged parents and they have no other

person to support them, the period of incarceration of 10 months which she had undergone out of the 4 years sentence which had been awarded

to her be treated as the sentence imposed upon her. On merits, it is submitted that the sample which was taken from the contraband was 1 kg; the

FSL had noted in its report that the sample which were received by them weighed 1039.79 g. How almost 40 grams came to be in excess has

not been explained by the prosecution. It is not as if the weight of the polythene in which the sample was kept weighed 40 grams. This clearly

shows that there is tampering in the contraband for which benefit of doubt must accrue to the appellant. The contraband was deposited in the

Malkhana on 10.6.2003 but it was sent to FSL after a month i.e. on 12.7.2013 which was against the notification of the Department which shows

that the contraband must be sent to the FSL for examination within next 72 hours. The delay again being unexplained is fatal to the version of the

prosecution. It is pointed out that there is no evidence on record to show that W/Head Constable Veena had given her search prior to searching

the appellant. Section 42 of the NDPS Act had not been complied with.

5. Arguments have been refuted. It is stated that on no count does the impugned judgment call for any interference. It is stated that provisions of

Section 42 of the NDPS Act as also Section 50 of the NDPS Act had been complied with and this has been noted in the impugned judgment. The

secret information had been reduced into DD which had been sent to the Superior Officer. There is also no possibility of tampering as the sample

was duly sealed. The seal of "NV" was affixed upon it. There was no disturbance in the seal. The appellant is not entitled to any benefit on merits.

On the quantum of sentence it is pointed out that the offence is grave and serious. The period of 10 months would not be sufficient to deter the

accused from committing similar crimes in the future.

6. Arguments have been heard and record perused.

7. The case of the prosecution is hinged on a secret information. This is evident from the testimony of PW-10 who had stated that he received a

secret information that a lady would be coming from Punjabi Basti carrying a plastic bag. This information was reduced into writing by him in the

DD Register which was duly forwarded to the SHO and the ACP. However, this DD has not seen the light of day through any evidence. It was

only an oral statement which had been made by the witnesses. Section 42(2) of the NDPS Act requires that if any secret information is received it

must be reduced into writing and must be sent to the senior officers. This is a mandatory provision. The Supreme Court has time and again

reiterated this position. This has been expounded in the judgment of a Constitution Bench of the Apex Court reported as Karnail Singh Vs. State

of Haryana, . This requirement of law has to be strictly complied with and the consequences of non-compliance are grave. The Apex Court had

noted that the harsh provisions of the NDPS Act cast a duty upon the prosecution to strictly follow the procedure and comply with all its

safeguards.

8. The Supreme Court in Sukhdev Singh Vs. State of Haryana, in this context had observed:

The provisions of Section 42 are intended to provide protection as well as lay down a procedure which is mandatory and should be followed

positively by the Investigating Officer. He is obliged to furnish the information to his superior officer forthwith. That obviously means without any

delay. But there could be cases where the Investigating Officer instantaneously, for special reasons to be explained in writing, is not able to reduce

the information into writing and send the said information to his superior officers, but could do it later and preferably prior to recovery. Compliance

of Section 42 is mandatory and there cannot be an escape from its strict compliance.

9. In the instant case, there has clearly been a non-compliance of this provision. The entire case of the prosecution is hinged upon a secret

information. Although PW-10 stated that he had recorded the secret information by way of the DD in the DD Register, yet there is no explanation

as to why this DD was not proved by producing this Register. The statement that it had been sent to Senior Officers has also not been proved

through any document. This provision has been engrafted in the Statute as a safeguard. It had to be complied with in its true letter and spirit which

has not been done; being a mandate, the non-compliance of it means that, a benefit of doubt must accrue in favour of the appellant. Accordingly,

giving the benefit of doubt to the appellant for non-compliance of Section 42(2) of the NDPS Act, the appellant is entitled to an acquittal.

10. This Court notes that the other arguments of the learned counsel for the appellant need not be gone into as this Court has arrived at a finding of

acquittal of the appellant for non-compliance of the provisions of Section 42(2) of the NDPS Act.

11. Appeal is allowed. Appellant is acquitted. Bail bond cancelled. Surety discharged.