

HON'BLE Dr. JUSTICE CHILLAKUR SUMALATHA

CRIMINAL APPEAL No.137 of 2016

JUDGMENT:

The appellant, who is the accused in NDSC.No.4 of 2014 on the file of the Court of Special Judge for Trial of Cases under N.D.P.S.Act – cum – I Additional Sessions Judge, Adilabad, was found guilty and was convicted for the offence punishable under Section 20(a)(b)(ii)(C) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter be referred to as “the NDPS Act” for brevity) and was sentenced to undergo rigorous imprisonment for a period of ten years and to pay fine of Rs.1,00,000/- and in default of payment of fine, to suffer simple imprisonment for six months. The findings given and the punishment imposed are assailed by the appellant/accused through this appeal.

2. Heard the submissions of the learned counsel for the appellant/accused as well as the learned Assistant Public Prosecutor, who is representing the respondent, and gave anxious consideration to their versions regarding the factual and legal aspects.

3. The case of the prosecution, if narrated in a narrow compass, as could be culled out through the charge sheet is

that on 02.12.2013, basing on the reliable information about the cultivation of Ganja by the appellant/accused, P.Ws.3 to 5 secured P.Ws.1 and 2 as mediators and rushed to the land in Survey No.10/110/A situated at Jaithuguda of Empally Revenue Village, Narnoor Mandal, Adilabad District. As they reached, the appellant/accused was found present at the said field. On interrogation, he disclosed his identity particulars and further stated that he is the owner of the said land. The Prohibition & Excise Officials issued a search memo and on search, they found six Ganja plants. The appellant/accused failed to produce any valid permission or licence for cultivating the Ganja. On further search, the Excise Officials found approximately 54 Kgs of dry Ganja in a white bag and the same was seized in the presence of the mediators under a cover of panchanama after drawing samples as required under law. The six Ganja plants were destroyed by burning and the appellant/accused was arrested. The samples drawn were forwarded to the Chemical Examiner, Nizamabad, and on examination, it was reported as "Ganja Positive".

4. On filing of charge sheet, the presence of appellant/accused was secured, a charge was framed thereafter and finally subjecting the evidence of P.Ws.1 to 6, Exs.P.1 to P.8 and M.Os.1 and 2 to scrutiny, the learned Judge of the trial Court came to a conclusion that the

prosecution established its case beyond reasonable doubt for the charge levelled and thereby convicted the appellant/accused. The findings given, as discussed earlier, are in dispute.

5. Having regard to the factual scenario as laid down in the charge sheet and the points raised in this appeal disputing the validity and the legality of the judgment rendered, the points that arise for consideration are:-

1) *Whether the respondent/State established beyond all reasonable doubt that the appellant/accused committed the offence charged?*

2) *Whether there exists any infirmity in the judgment of the trial Court either in appreciating the facts of the case or in applying the principles of law to the said facts as contended by the appellant herein, which, in turn, requires the interference of this Court exercising appellate jurisdiction?*

6. POINT Nos.1 and 2:-

Seriously disputing the validity of the judgment of conviction rendered by the trial Court, the learned counsel for the appellant/accused submits that the appellant/accused was not produced before the Gazetted Officer as required under law and he was not appraised of his right of being searched and further, there is a clear discrepancy with regard to the number of bags seized from the possession of the

appellant/accused. Learned counsel further points out that in the panchanama, it is mentioned that there were 50 Ganja plants, whereas the witnesses deposed that there were 5 Ganja plants and if at all the Excise Officials, as contended by them, have visited the alleged scene of offence and conducted a raid, there would not have been such a discrepancy. Learned counsel also stated that the ownership of the subject land is not established by the prosecution and therefore, the entire case is unsustainable.

7. On the other hand, the learned Assistant Public Prosecutor submits that all the material witnesses supported the case of the prosecution and their evidence is cogent and convincing and therefore, the trial Court rightly convicted the appellant/accused and hence, the judgment needs no interference.

8. In the light of the above submissions made, it has to be seen how far their contentions and pleas are justified.

9. As per the version of the prosecution, the entire search and seizure went on in the presence of P.Ws.1 and 2. However, both of them failed to support the case of the prosecution. The evidence of P.W.1 is that Police never called them to act as panchas and they have obtained his signatures on white papers at Police Station around 1½ year back and

nothing was seized in his presence. P.W.2 also gave evidence to the same effect and her signatures over the panchanama and search memo were marked as Exs.P.3 and P.4. Learned Assistant Public Prosecutor stated that though the mediators have turned hostile, yet the Officials, who have raided, conducted search and seized the contraband, supported the case of the prosecution and gave all the details in convincing terms, hence, their evidence can form basis for convicting the appellant/accused and the same is done by the trial Court.

10. This Court totally agrees with the statement of the learned Assistant Public Prosecutor that the evidence of the official witnesses cannot be thrown out on the sole ground that the mediators or panch witnesses have exhibited hostility and failed to support the case of the prosecution before the Court of law. However, for placing reliance upon the evidence of such Official witnesses, what is required is that their evidence should be free from all infirmities and should not leave any room suspecting the case of the prosecution. Therefore, it has to be seen whether their evidence is such. A meticulous perusal of their evidence i.e., the evidence of P.Ws.3 to 5 does not inspire confidence for more than one reason which are as follows:

i) The evidence of P.W.3 is that on 02.12.2013 at around 8.00 A.M, on the instructions of the Assistant Excise

Superintendent, Adilabad, he proceeded to Utnoor Excise Station in order to conduct raid and he accompanied P.W.4 – Arun Kumar, and P.W.5 – Shyam Kumar, to Jaithuguda Village and reached the fields of the appellant/accused. The evidence of P.W.4 in this regard is that on the directions of the Assistant Excise Superintendent, P.W.3 came to his Station at Utnoor and both of them proceeded to Jaithuguda and on the way, they secured P.Ws.1 and 2 and also P.W.5 – Shyam Kumar. However, surprisingly, the evidence of P.W.5 is that on 02.12.2013 in the afternoon he received instructions from the Mandal Revenue Officer, Narnoor, to conduct panchanama at Empally Village over Ganja and as he was at the field work in Narnoor Mandal, he immediately proceeded to the fields at Empally Village shivar and the Excise Police persons were present there along with some villagers and the appellant/accused. Thus, as per the evidence of P.Ws.3 and 4, themselves, the mediators and P.W.5, all reached the alleged scene of offence at the same time. However, the evidence of P.W.5 is quite contradictory and he says that he received information in the afternoon and by the time he reached the spot, the Excise Officials were present. Which version is to be believed upon is not known. The trial Court lost sight of this discrepancy.

ii) The evidence of P.W.3 is that they found six Ganja plants in the fields of the appellant/accused and they also found one gunny bag filled with Ganja and the weight of the said Ganja was around 54 Kgs and for convenience of carrying, they packed the seized Ganja in two gunny bags. Thus, the evidence of P.W.3 is that the Ganja was found in a gunny bag. But, P.W.4 stated that they found Ganja in a white colour bag. Coming to P.W.5, he states that at the scene of offence, there were four to five Ganja bags and they were seized before he reached the spot. He further stated that as per the report, the Ganja was packed in seven bags and 50 Ganja plants were present in the field. He volunteers that instead of 5 plants, it was mentioned as 50 plants and the same was a typographical error. No clarification is given as to why there arose such a discrepancy. This material deviation is also ignored by the trial Court.

iii) Coming to another material aspect which is noticed is that the trial Court convicted the appellant/accused for the offence punishable under Section 20(a)(b)(ii)(C) of the NDPS Act. Now, let us see what Section 20 of the NDPS Act says. The said provision is reproduced as under:-

“20. Punishment for contravention in relation to cannabis plant and cannabis. —Whoever, in contravention of any provision of this Act or any rule or order made or condition of licence granted thereunder,-

- (a) *cultivates any cannabis plant; or*
- (b) *produces, manufactures, possesses, sells, purchases, transports, imports inter-State, exports inter-State or uses cannabis, shall be punishable, —*
 - (i) *where such contravention relates to clause (a) with rigorous imprisonment for a term which may extend to ten years and shall also be liable to fine which may extend to one lakh rupees; and*
 - (ii) *where such contravention relates to sub-clause (b),—*
 - (A) *and involves small quantity, with rigorous imprisonment for a term which may extend to one year, or with fine, which may extend to ten thousand rupees, or with both;*
 - (B) *and involves quantity lesser than commercial quantity but greater than small quantity, with rigorous imprisonment for a term which may extend to ten years and with fine which may extend to one lakh rupees;*
 - (C) *and involves commercial quantity, with rigorous imprisonment for a term which shall not be less than ten years but which may extend to twenty years and shall also be liable to fine which shall not be less than one lakh rupees but*

which may extend to two lakh rupees:

Provided that the court may, for reasons to be recorded in the judgment, impose a fine exceeding two lakh rupees.”

11. The above provision thus consists of two limbs.

Firstly, whoever in contravention of any provision of the NDPS Act or any rule or order made thereunder cultivates any cannabis plant, such person shall be punishable with rigorous imprisonment for a term which may extend to ten years and shall also be liable to fine which may extend to one lakh rupees. Thus, for the offence committed under Section 20(a) of the NDPS Act, the penal provision is Section 20(b)(i) of the NDPS Act.

Secondly, whoever in contravention of any provision of the NDPS Act or any rule or order made thereunder produces, manufactures, possesses, sells, purchases, transports, imports inter-State, exports inter-State or uses cannabis, shall be punishable for such contravention as provided under Section 20(b)(ii) of the NDPS Act. For the above offence, three categories of punishment are provided basing on quantity.

i) If the contraband is small in quantity, the punishment would be as provided under Section 20(b)(ii)(A) of the NDPS Act.

ii) If the quantity of the contraband is lesser than commercial quantity but greater than small quantity, the punishment would be as provided under Section 20(b)(ii)(B) of the NDPS Act.

iii) If the contraband is of commercial quantity, the punishment would be as provided under Section 20(b)(ii)(C) of the NDPS Act.

12. Such being the law laid down under which the punishment has to be imposed, the trial Court passed the judgment of conviction holding that the appellant/accused committed offence punishable under Section 20(a)(b)(ii)(C) of the NDPS Act. But as discussed supra, Sections 20(a) and 20(b) are different and they carry different punishments. Therefore it can be held that provision under which charge is framed and sentence passed are improper. Also, by all the discussion that went on, it is quite evident that the alleged mediators failed to support the case of the prosecution and there is clear variation between the evidence of P.Ws.3 and 4 on one hand and P.W.5 on the other hand regarding the search and seizure. Therefore, this Court holds that the said evidence cannot at all form basis for convicting the appellant/accused. Therefore, this Court holds that the said judgment is unsustainable in the eye of law.

13. Resultantly, the Criminal Appeal is allowed. The judgment of the Court of Special Judge for Trial of Cases under N.D.P.S.Act – cum – I Additional Sessions Judge, Adilabad, in NDSC.No.4 of 2014, dated 22.07.2015, is set aside. The appellant/accused is found not guilty of the offence charged and thereby, he is acquitted of the said charge under Section 235(1) of Cr.P.C. The appellant/accused shall be set at liberty forthwith, if he is not required in any other cases. The fine amount, if any paid, shall be refunded to him. The miscellaneous applications pending, if any, shall stand closed.

Before parting with the case, this Court considers it desirable to make following observation.

Framing proper charge, that too which would be in consonance and in accordance with Sections 211 to 224 of Cr.P.C. is the primary duty of any Criminal Court. Having regard to the complexity involved in describing the offence and prescribing appropriate punishment as legislated under Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985, and further sensing the difficulty in framing appropriate and proper charges, as a ready reckoner and guidance to Special Courts dealing with NDPS cases, the following basic information regarding the form and contents of Charge is provided:

I. FOR THE ALLEGATION THAT THE ACCUSED WAS FOUND CULTIVATING CANNABIS PLANT:

If the allegation, as per the contents of the charge sheet and other relevant material, is that the accused was found cultivating cannabis plant in contravention of any of the provisions of NDPS Act or any Rule or Order made or Condition of licence granted thereunder:

Relevant provision -Section 20(a) of the NDPS Act

Penal provision – Section 20(b)(i) of the NDPS Act -
Rigorous imprisonment for a term which may extend to ten years and with fine which may extent to one lakh rupees.

It is desirable that the charge for the said offence would be as under:-

That you, on or about..... day of..... at, was found cultivating cannabis plant without license or permission to do so and thereby, committed an offence punishable under Section 20(b)(i) of the Narcotic Drugs and Psychotropic Substances Act, 1985 and within the cognizance of this Court.

II. FOR THE ALLEGATION THAT THE ACCUSED WAS FOUND PRODUCING, MANUFACTURING, POSSESSING, SELLING, PURCHASING, TRANSPORTING, IMPORTING INTER-STATE, EXPORTING INTER-STATE OR USING CANNABIS:

If the allegation, as per the contents of the charge sheet and other relevant material, is that the accused was found producing, manufacturing, possessing, selling, purchasing, transporting, importing inter-state, exporting inter-state or using cannabis,

Relevant provision - Section 20(b) of the NDPS Act

a) Penal provision where the contravention involves small quantity -Section 20(b)(ii)(A) of the NDPS Act - Rigorous imprisonment for a term which may extend to one year or with fine which may extend to ten thousand rupees or with both.

It is desirable that the charge for the said offence would be as under:-

That you, on or about.....day of at , was found producing/manufacturing/possessing/selling/purchasing/transporting/importing inter-state/exporting inter-state/using cannabis and the quantity being, is a small quantity as provided under the Act and thereby, committed an offence punishable under Section 20(b)(ii)(A) of the Narcotic Drugs and Psychotropic Substances Act, 1985 and within the cognizance of this Court.

b) Penal provision where the contravention involves the quantity which is lesser than commercial quantity but

greater than small quantity - Section 20(b)(ii)(B) of the NDPS Act - Rigorous imprisonment for a term which may extend to ten years and with fine which may extend to one lakh rupees.

It is desirable that the charge for the said offence would be as under:-

That you, on or about.....day of at ..., was found producing/manufacturing/possessing/selling/purchasing/transporting/importing inter-state/exporting inter-state/using cannabis and the quantity being, which is less than commercial quantity but greater than small quantity as provided under the Act and thereby, committed an offence punishable under Section 20(b)(ii)(B) of the Narcotic Drugs and Psychotropic Substances Act, 1985 and within the cognizance of this Court.

c) Penal provision where the contravention involves commercial quantity- Section 20(b)(ii)(C) of the NDPS Act - Rigorous imprisonment for a term which shall not be less than ten years but which may extend to twenty years and shall also be liable to fine which shall not be less than one lakh rupees but which may extend to two lakh rupees.

It is desirable that the charge for the said offence would be as under:-

That you, on or about.....day of at ..., was found producing/manufacturing/possessing/selling/purchasing/transporting/importing inter-state/exporting inter-state/using cannabis and the quantity being, is a commercial quantity as provided under the Act and thereby, committed an offence punishable under Section 20(b)(ii)(C) of the Narcotic Drugs and Psychotropic Substances Act, 1985 and within the cognizance of this Court.

The above enumeration is wholly directory. Required modification/addition is always desirable to make the Charge wholesome and understandable. Finally, all endeavor should be to provide information which is reasonably sufficient to the accused of the matter with which he is charged.

Dr. JUSTICE CHILLAKUR SUMALATHA, J

21.01.2022

Note:

LR copy to be marked.

B/o

Vs/dr