

IN THE SUPREME COURT OF INDIA  
CRIMINAL APPELLATE JURISDICTION  
Criminal Appeal No(s). 1206 of 2013

HANIF KHAN @ ANNU KHAN

Appellant(s)

VERSUS

CENTRAL BUREAU OF NARCOTICS  
THROUGH INSPECTOR L.P.OJHA

Respondent(s)

O R D E R

The appellant is aggrieved by his conviction under Sections 8 and 18(b) of the Narcotic Drugs and Psychotropic Substances Act, 1985 ("the NDPS Act") sentencing him to 10 years rigorous imprisonment, along with fine of Rs. 1 lakh, with a default stipulation.

Learned counsel for the appellant submits that the allegations were with regard to illegal sale/purchase between the appellant and the acquitted co-accused. No appeal has been filed against the acquittal. If the sale/purchase was not established, the conviction of the appellant alone is improper. It is next submitted that PW-1 and PW-2, the independent witnesses to the search and seizure have turned hostile and have denied their presence during such search and seizure.

Learned counsel further submits that the search and seizure memo itself is suspicious in view of the large gap in space between the signature of the appellant and that of

the of the independent witnesses.

Relying on Narcotics Control Bureau vs. Sukh Dev Raj Sodhi (2011) 6 SCC 392, it is submitted that there has been non-compliance with Section 50 of the NDPS Act as the appellant was not informed of his legal right to be searched before a Magistrate. The entire allegations of recovery against the appellant are suspicious as even his father's name has been recorded incorrectly.

The last submission was that there was an inordinately long delay of one year in production of the seized sample before the Court. PW-6 has not furnished any satisfactory explanation with regard to the same. The Trial Court has itself recorded its satisfaction with regard to the signatures on the seizure memo having become illegible. It creates a serious doubt as to whether the sample produced in court was the same as alleged to have been recovered from the appellant. The appellant has been seriously prejudiced in the trial for that singular reason apart from the other grounds urged. Reliance is placed on Vijay Pandey vs. State of Uttar Pradesh 2019 (10) SCALE.

Learned counsel for the respondent submitted from the seizure memo, that Section 50 of the NDPS Act stands complied. The appellant was informed of his legal right to be searched in presence of a Magistrate if he so desired. He voluntarily consented to be searched by PW-5, the Sub-

Inspector. The fact that there may be any gap between the signature of the appellant on the seizure memo, and the signature of the attesting witnesses, is not very relevant in view of the search and seizure conducted in accordance with the law and the consequent recovery. The acquittal of the co-accused was premised on the only material against him being the confession of the appellant.

The sample taken from the seized material was sent the very next day to the Forensic Science Laboratory ("FSL"). There are no allegations of the seal on the sample being tampered. The laboratory test has confirmed the seized material to be Opium. Our attention was also invited to the original Malkhana Register, to demonstrate that the seized sample was deposited on the very same day. In the circumstances, it was submitted that no prejudice has been caused to the appellant even if the signatures on the seized sample had become illegible.

We have considered the submissions on behalf of the parties. The prosecution under the NDPS Act carries a reverse burden of proof with a culpable mental state of the accused. He is presumed to be guilty consequent to recovery of contraband from him, and it is for the accused to establish his innocence unlike the normal rule of criminal jurisprudence that an accused is presumed to be innocent unless proved guilty. But that does not absolve the prosecution from establishing a

prima facie case only whereafter the burden shifts to the accused. In *Noor Aga v. State of Punjab*, (2008) 16 SCC 417 it was observed as follows :

58. Sections 35 and 54 of the Act, no doubt, raise presumptions with regard to the culpable mental state on the part of the accused as also place the burden of proof in this behalf on the accused; but a bare perusal of the said provision would clearly show that presumption would operate in the trial of the accused only in the event the circumstances contained therein are fully satisfied. An initial burden exists upon the prosecution and only when it stands satisfied, would the legal burden shift. Even then, the standard of proof required for the accused to prove his innocence is not as high as that of the prosecution. Whereas the standard of proof required to prove the guilt of the accused on the prosecution is "beyond all reasonable doubt" but it is "preponderance of probability" on the accused. If the prosecution fails to prove the foundational facts so as to attract the rigours of Section 35 of the Act, the actus reus which is possession of contraband by the accused cannot be said to have been established.

Because there is a reverse burden of proof, the prosecution shall be put to a stricter test for compliance with statutory provisions. If at any stage, the accused is able to create a reasonable doubt, as a part of his defence, to rebut the presumption of his guilt, the benefit will naturally have to go to him.

The contraband is stated to have been seized from the appellant on 28 December 2001. The Malkhana Register undoubtedly shows that the seized sample was deposited the same day. There is also no dispute with regard to the sample extracted and sent to the FSL for examination confirming

that the contraband was Opium and that the seal had not been tampered with in any manner.

The fact that the independent witnesses may have turned hostile is also not very relevant so long as they have admitted their signatures on the seizure memo. The seizure memo is also signed by the accused. There has been compliance with section 50 of the NDPS Act also, as the appellant was duly informed of his legal rights. But, considering the nature of the present prosecution under the NDPS Act, we are satisfied that the ground urged on behalf of the appellant with regard to the large vacant place below his signature and that of the independent witnesses, is clearly abnormal and cannot be lightly wished away especially when the independent witnesses have deposed that they were not present at the time of such search and seizure. It certainly creates a doubt with regard to the veracity of the allegations made by the prosecution.

The delay in the production of the seized sample coupled with the signature on the seal being illegible, to our mind creates a serious doubt with regard to the prosecution case. There is no credible evidence that the FSL sample produced related to the very same contraband stated to have been seized from the appellant. PW-6 in his cross-examination, did not offer any reasonable explanation why the sample seized from the appellant and deposited in the

Malkhana could not be produced in the Court except after a long gap of one year. His explanation that he had several important works can hardly be considered sufficient, if not, any justification for the same.

We have also examined the Malkhana Register from the Trial Court records. While there is an entry with regard to the deposit, Column 11 dealing with the exit from the Malkhana for taking it to the Court is blank. It may not be unreasonable to presume that the delay in production of the seized sample before the Court was occasioned due to lack of identification consequent to the signatures on the seized sample having illegible. Therefore what may have been produced in court cannot be held to be conclusively the same sample as seized from the appellant.

Learned counsel for the respondent did make an effort to convince us that there will be a difference where the sample is never produced in Court as compared to a case where a sample is produced and an argument is made that it may not be the same sample especially when an FSL report has been made available in time, which causes no prejudice to the accused. We are unable to accept the submission.

There can hardly be any difference between a case of non-production of a sample and the production of a sample doubtful in its identity in being co-related to what was seized from the accused. In both the cases, it will become

doubtful if the FSL Report is with regard to the very sample seized from an accused.

Unfortunately, the High Court did not advert to the evidence of PW-6 or consider the prejudice that may have been or may not been caused to the appellant by the doubtful identity of the sample stated to have been seized from him.

In view of the law laid down by this Court in Vijay Jain vs. State of Madhya Pradesh (2013) 14 SCC 527 and Ashok alias Dangra Jaiswal vs. State of Madhya Pradesh (2011) 5 SCC 123, on the single premise of a doubtful identity with regard to the sample seized from the appellant and that produced in Court, the FSL Report loses much of its significance and the appellant is held entitled to the benefit of doubt.

The appeal therefore deserves to be allowed. It is ordered accordingly.

The appellant is stated to be on bail. His bail bonds shall stand discharged.

Pending application(s), if any, shall stand disposed of.

.....J.  
(Navin Sinha)

.....J.  
(Indira Banerjee)

New Delhi  
August 20, 2019

ITEM NO.101

COURT NO.12

SECTION II-A

S U P R E M E C O U R T O F I N D I A  
RECORD OF PROCEEDINGS

Criminal Appeal No(s). 1206/2013

HANIF KHAN @ ANNU KHAN

Appellant(s)

VERSUS

CENTRAL BUREAU OF NARCOTICS  
THROUGH INSPECTOR L.P.OJHA

Respondent(s)

Date : 20-08-2019 This appeal was called on for hearing today.

CORAM :

HON'BLE MR. JUSTICE NAVIN SINHA  
HON'BLE MS. JUSTICE INDIRA BANERJEE

For Appellant(s)

Mr. Vijay Kumar, AOR  
Ms. Vithika Garg, Adv.  
Ms. Vidushi Garg, Adv.

For Respondent(s)

Ms. Binu Tamta, Adv.  
Mr. Rajnish Prasad, Adv.  
Mr. B. V. Balaram Das, AOR

UPON hearing the counsel the Court made the following  
O R D E R

The appeal is allowed in terms of the signed order.

Pending application(s), if any, shall stand disposed of.

(MANISH SETHI)  
COURT MASTER (SH)

(SAROJ KUMARI GAUR)  
BRANCH OFFICER

(Signed order is placed on the file)