THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 13.07.2007

+ **CRL REV. P. No.844/2005**

UNION OF INDIA ... Petitioner

- versus -

STEPHEN ANDREAS HOFMAN ... Respondent

WITH
CRL APPEAL No.671/2006

UNION OF INDIA ... Petitioner

- versus -

STEPHEN ANDREAS HOFMAN ... Respondent

Advocates who appeared in this case:
For the Petitioner : Mr P.P. Malhotra, ASG with Mr Pramod Bago, Mr Chetan Chawla and Mr Gaurav Sharma
For the Respondent : Mr Rajiv Dawar with Mr Vikas Dudeja

CORAM:-
HON'BLE MR JUSTICE BADAR DURREZ AHMED

1. Whether Reporters of local papers may be allowed to see the judgment ? YES

2. To be referred to the Reporter or not ? YES

3. Whether the judgment should be reported in Digest ? YES

BADAR DURREZ AHMED, J

1. This judgment shall dispose of Criminal Revision Petition 844/2005 as well as the Criminal Appeal 671/2006. Both, the revision petition and the appeal, have been filed on behalf of the Union of India.

The revision petition has been filed in respect of the order on charge dated 19.09.2005 passed by the Special Judge, NDPS, New Delhi whereby he came to the conclusion that the recovery of the contraband was of a small quantity and that the case was triable by a Magistrate. Accordingly, he sent the file to the learned ACMM, Patiala House Courts, New Delhi for trial and disposal of the case as per law. The appeal has been filed against the judgment dated 22.11.2005 as also the order on sentence of the same date passed by the learned ACMM, New Delhi.

2. A few important facts need to be stated at the outset. After the passing of the order on charge dated 19.09.2005 (which is the subject matter of the revision petition), the matter was heard and tried by the learned ACMM. The respondent / accused pleaded guilty to the charge under Sections 20 (b) (ii) (A) / 23 (a) read with Section 27 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as 'the NDPS Act'). On the accused pleading guilty, the learned ACMM convicted him of the said offences on 22.11.2005. The order on sentence of the same date was to the effect that the respondent's sentence was limited to the period already undergone by him in custody

(three months and seven days) coupled with a fine of Rs 10,000/- under Section 20 (b) (ii) (A) of the NDPS Act. The respondent paid the fine of Rs 10,000/-. The respondent was a Swiss national and his passport had earlier been impounded. On having undergone the aforesaid sentence and fine, the respondent's passport was released by an order of the learned ACMM on 24.11.2005. Thereafter, the respondent left for his home country—Switzerland.

3. It is pertinent to note that the order on charge was passed on 19.09.2005, but the revision petition was filed only on 26.11.2005, after the order of conviction and sentence had been passed by the learned ACMM on 22.11.2005. The appeal itself was filed, admittedly, beyond 84 days of the prescribed period. As such, a condonation of delay application was filed alongwith the appeal. I shall refer to the same later.

4. Briefly stated the facts of the case are that on 08.04.2005, the respondent, a Swiss passport holder, arrived at IGI Airport, New Delhi by Flight No. RA-217 from Kathmandu and was to catch Flight No.BA-142 for Zurich via London. While the accused was waiting for his onward flight in the Customs Departure Hall, he was stopped by the

complainant who called two independent witnesses and in their presence the respondent was asked whether he was carrying any narcotic drug or psychotropic substances. He answered in the negative. Thereafter, a search of his checked-in baggage was carried out in terms of the provisions of the NDPS Act. The checked-in bag was found locked and the accused / respondent opened the lock with his key. Besides other things, a bag contained 6 packets of *agarbattis* (incense sticks) branded as "*Satya Masala Chandan Agarbatti*" were found. Four of the packets did contain *agarbattis* (incense sticks). The other two packets, however, were found to contain black polythene bags. On opening the black polythene bags, it was found that there was some substance wrapped in the pages of a Nepalese newspaper—"Himalayan Times". On unwrapping them, they were found to contain a black substance wrapped in transparent polythene capsules. One hundred such capsules were found. A small quantity of the black substance was taken out from the capsules and after homogeneously mixing the same, it was tested with the field drug testing kit which gave a positive result for narcotic drugs. On being questioned, the accused / respondent informed that the black substance in the capsules was '*hashish*'. The weight of the 100 capsules, which purported to be '*hashish*', was 500 grams as determined by the

electronic weighing machine. Since *hashish* is banned and prohibited under the NDPS Act, the same was liable for confiscation. The complainant seized the entire 500 grams of the substance, which purported to be *hashish,* under Section 42 of the NDPS Act. Thereafter, he took two samples of 25 grams each from a homogeneous mixture of the seized substance. The samples were packed separately in envelopes marked S-1 and S-2 respectively. The sample marked S-1 was to be sent to the Central Revenue Control Laboratory (CRCL), New Delhi. The sample marked S-2 was to be sent to the warehouse. Thereafter, a panchnama was drawn on the spot and the accused / respondent was arrested on 09.04.2005. The sample marked S-1 alongwith the test memo was deposited in the CRCL. The report of the CRCL was collected and on completion of investigation, the complaint was filed in the court of the Special Judge, NDPS, New Delhi. The CRCL report indicated that the test was conducted on 18.05.2005. The qualitative tests employed were macroscopic, microscopic, chemical and chromatographic examinations. The results of the quantitative test revealed:

> "'THC' content = 3.3% (three decimal three)"

The general observation of the chemist was:-

> "The sample is in the form of dark brown coloured mass: it answers positive test for 'Charas'.

The report of the CRCL, therefore, was as under:-

> "The sample is in the form of dark brown coloured mass. On the basis of macroscopic, microscopic, chemical and chromatographic examinations, it is concluded that the sample u/r answers positive test for 'Charas'.
>
> "Tetrahydro cannabinol (THC) content in the sample u/r is 3.3% (three decimal three)."

5. On the basis of the CRCL report, the learned Special Judge, NDPS, New Delhi, by the said order dated 19.09.2005, held that the *charas* recovered in this case was a small quantity. This conclusion was arrived at on the basis of the quantitative test which indicated 3.3% THC content which came to 16.5 grams. According to the learned Special Judge, this actual content of *charas* in the substance was a small quantity as per the notification issued under clauses (viia) and (xxiiia) of Section 2 of the NDPS Act which specified small quantities and commercial quantities. In the table mentioned in the notification, *charas* / *hashish* appears in Entry 23. The small quantity specified is 100 grams and the commercial quantity specified is 1 kilogram. The learned Special Judge concluded on the basis of two decisions of this court that since the actual content of *charas* in the substance was found to be 3.3%, which

translated to 16.5 grams by weight, the same was a small quantity and, therefore, the case was triable by a Magistrate. Under these circumstances, he sent the file to the learned ACMM for trial and disposal of the case as per law. Thereafter, the trial was proceeded with. The accused / respondent pleaded guilty and was convicted, as indicated above, under Section 20 (b) (ii) (A) and Section 23 (a) read with Section 28 of the NDPS Act. He was sentenced accordingly, as already indicated above, which has been served out and the fine amount has also been paid.

6. It was contended on behalf of the Union of India, which is both the petitioner in the revision petition and the appellant in the appeal, that the test report indicated 3.3% content of Tetrahydro Cannabinol (THC). Entry No.150 in the said notification is specific to tetrahydrocannabinol and the small quantity thereof is only two grams, whereas, if 3.3% of 500 grams were to be taken into consideration, the quantity by weight would be 16.5 grams which is more than two grams and, therefore, it was not a small quantity and the learned Special Judge erred in sending the matter for trial before the Magistrate. Since the case could not be tried by the Magistrate, therefore, the order dated 22.11.2005 was without jurisdiction and was liable to be set aside. He

placed reliance on the provisions of Section 36 of the NDPS Act as well as the decision of the Supreme Court in the case of ***A.R. Antulay v. R.S. Nayak & Another*****: 1988 (2) SCC 602**. He also placed reliance on the provisions of Section 461, CrPC to indicate that this was an irregularity of such a nature which would vitiate the trial and the entire proceedings would be void.

7. The learned counsel for the respondent submitted that the complaint was filed under Sections 20, 23 and 28. The complaint was not under Section 22 which relates to psychotropic substances. The Schedule to the NDPS Act indicates 'THC' as a psychotropic substance under Item No.13, whereas Section 20 of the NDPS Act is specific to contraventions in relation to cannabis plant and cannabis. Cannabis (hemp) has been defined in Section 2 (iii) of the NDPS Act. Under Section 2 (iii) (a), cannabis has been defined to mean 'c*haras'*, that is, separated resin, in whatever form, whether crude or purified, obtained from the cannabis plant and also included concentrated preparation and resin known as *hashish*. In this context, he submitted that from the very beginning, the case of the prosecution was with respect to *charas* / *hashish*. The case was not in respect of THC which is a separate

psychotropic substance. The substance that was recovered was shown to be *charas* and not THC. THC is comprised in *charas* and the sample indicated a 3.3% content thereof. But this does not mean that the content of THC would translate to 16.5 grams. The 3.3% was relatable to the actual content of *charas* in the recovered substance of 500 grams. Therefore, the small quantity / commercial quantity has to be ascertained with reference to the notified weights in respect of *charas* and not in respect of THC. It was, therefore, contended that the order on charge passed by the learned Special Judge (NDPS), New Delhi on 19.09.2005 was the correct order. That being the case, no interference was called for either in the revision petition or in the appeal.

8. I agree with the submissions made by the learned counsel for the respondent. There are also further difficulties with both the revision petition as well as the appeal. First of all, the revision petition was filed after the trial had already concluded and a finding of guilt had been returned and a sentence thereon had already been passed. It is not as if the revision petition was filed before the trial concluded. Secondly, the appeal that was filed was filed beyond the period prescribed. There was a delay of 84 days. The only reason for seeking condonation of delay

given by the appellant was that it was under the impression that on the acceptance of the revision petition, the case would be restored to its original position as on 19.09.2005. Therefore, the appeal was not filed. It is further stated that during the course of the arguments in the revision petition on 21.03.2006, the appellant came to realise that the judgment and order dated 22.11.2005 passed by the learned ACMM needed to be challenged by way of an appeal under Section 377, CrPC. It is thereafter that the appeal was filed. I am of the view that, firstly, the revision petition ought not to have been filed challenging the order dated 19.09.2005 when it had already merged in the judgment and / or order of conviction dated 22.11.2005. This is apart from the question that, on merits also, I do not find any serious infirmity with the order dated 19.09.2005 for the reasons already indicated above. I am also of the view that the mere filing of the revision petition was not ground enough for the appellant to have not filed the appeal in time. It could not assume that the revision petition was bound to be allowed and such an assumption would not amount to an explanation of the delay in filing the appeal.

9. Consequently, the revision petition as well as the appeal are

liable to be dismissed. They are dismissed.

BADAR DURREZ AHMED
(JUDGE)

July 13, 2007
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