

Rajesh Jagdamba Avasthi vs State Of Goa on 3 November, 2004

Equivalent citations: 2004(97)ECC401, RLW2005(2)SC177, 2004(9)SCALE539, (2005)9SCC773, 2005(1)UJ269(SC), AIR 2005 SUPREME COURT 1389, 2005 (9) SCC 773, 2004 AIR SCW 7239, 2005 (3) SRJ 322, 2005 (1) UJ (SC) 269, 2004 (7) SLT 85, 2005 CRILR(SC&MP) 33, 2004 (9) SCALE 539, 2004 (4) LRI 976, 2006 (1) SCC (CRI) 150, (2005) 25 ALLINDCAS 658 (SC), 2005 CRILR(SC MAH GUJ) 33, (2005) 1 PAT LJR 215, (2004) 9 SCALE 539, (2005) 1 JLJR 135, (2004) 117 ECR 788, (2005) 1 EFR 1, (2005) 30 OCR 77, (2005) 1 RAJ CRI C 41, (2004) 3 CHANDCRIC 397, (2005) 1 ALLCRILR 539, (2005) 1 RECCRIR 406, (2005) 1 SCJ 36, (2004) 8 SUPREME 171, (2005) 2 BOMCR(CRI) 929, (2005) 51 ALLCRIC 315, (2004) 4 CRIMES 347, (2004) 4 CURCRIR 291, 2005 CHANDLR(CIV&CRI) 439, (2005) 1 ALLCRIR 247, 2005 (1) ANDHLT(CRI) 82 SC

Bench: B.P. Singh, Arun Kumar

JUDGMENT

1. The appellant was put up for trial before the Narcotic Drugs and Psychotropic Substances Court, Mapusa in Special Criminal Case No. 2/1995 charged of the offence punishable under Section 20(b)(ii) of the N.D.P.S. Act, 1985. The trial court by its judgment and order dated 22nd March, 1996 found him guilty of the charge and sentenced him to undergo rigorous imprisonment for a period of ten years and to pay a fine of Rs. One lakh, in default to undergo further imprisonment for a period of two years. The High Court in appeal upheld the conviction but modified the sentence in as much as it upheld the substantive sentence of ten years rigorous imprisonment as also the fine of Rs. one lakh, but reduced the sentence in default from two years to one years, The judgments of the courts below are challenged before us in this appeal by special leave.

2. The facts of the case are that on 14 th December, 1994 one P.C. Kulbi was apprehended by the police and was found to be in possession of Charas. He was interrogated. In the course of interrogation, he disclosed the involvement of the appellant, who as stated by P.C. Kulbi, had Charas hidden in his shoes. He volunteered to identify the appellant. The said P.C. Kulbi accompanied the police party to Anjuna beach where he pointed out the appellant, who was immediately apprehended and searched. From his shoes a substance, allegedly Charas was recovered. According to prosecution, from the shoe on the right foot 100 gms. of that substance, and from the shoe on the left foot 115 gms. of that substance was recovered. The recovery was made in the presence of two public witnesses of whom one was Nitin Kesarkar (PW.2). The other witness was not examined by the prosecution. The seized substance was duly packed and sealed and sent for chemical examination. The report disclosed that the substance seized was Charas.

3. PW-4, Naresh Mhamal, who conducted search, was a police sub-inspector attached to the Anti Narcotic Cell, police station. He deposed that on 14 th December, 1994, he had gone to Flea Market

Anjuna, along with PSI Thorat, Head Constable, K.G. Desai and some others accompanied by two panchas. PSI Thorat arrested one Premchand Kulbi for possession of suspected substance namely Charas, On questioning, Kulbi disclosed that he had come to Goa along with his friend, the appellant herein, from Himachal Pradesh and that his friend, the appellant herein, had concealed Charas in his shoes. He accompanied the police party and identified the appellant who was apprehended by the police party, According to him, he informed the appellant that he had received information from P.C. Kulbi that he had concealed Charas in his shoes and that he wished to search him for the said contraband He also informed him that he had a right to be searched in presence of a Gazetted Officer or a Magistrate, and that he also had a right to search him and the members of the raiding party as well as panchas. The appellant, however, declined both the offers and thereafter he was searched by him. He was asked to remove his shoes, and as noticed earlier, from both the shoes a substance was recovered which appeared to be narcotic drug. The substance recovered was weighed What was recovered from the right shoe was found to weigh 100 gms. whereas substance recovered from the left shoe weighed 115 gms. They were packed and sealed in two envelopes marked 'A and B', It is not necessary to refer to the recovery of other articles found on search of the person of the appellant. According to PW-4, the two envelopes in which the seized substance was packed and sealed along with covering letter was handed over to police inspector, Anti Narcotic Cell, Panaji. The covering letter contained a request to forward the substance recovered for analysis. The person to who the two envelopes along with the covering letter were handed over was Inspector Yadav.

4. On the following day i.e. on 15.12.1994, he took charge of the said sealed envelopes and handed them over to PW-3, Manohar Joshi at 8.30 A.M. PW-3 was then posted as Scientific Assistant in the Crime Branch of the C.I.D. On 16.12.1994, PW-3 forwarded the envelopes in which the substance had been sealed to PW-1, Junior Scientific Officer, named Mahesh Kaissare, who was then posted in the Directorate of Food and Drug Administration. The envelopes were forwarded through a police constable, who has not been examined. Report was received on January 4, 1995 which disclosed that the substance contained in the two envelopes was Charas. The quantity found in envelope A was 98.16 gins, and in envelope B 82.54 gms. According to PW-1 he found the seal intact and the seal bore the inscription "Anti Narcotic Cell".

5. Charge was framed against the appellant under Section 20(b)(ii) on 26.4.1995 for having been found in possession of 180.70 gms. of Charas.

6. Counsel appearing on behalf of the appellant has urged before us the following submissions. Firstly, he submitted that the seal which was put on the two envelopes soon after alleged recovery of Charas was different from the seal found on the sealed envelopes by the Junior Scientific Officer (PW-1) who conducted the chemical analysis of the substance forwarded to him in the two envelopes. It was, therefore, not certain whether what was sent to the laboratory for chemical analysis was the same substance which was seized and sealed by PW-4 on 14.12.1994. Secondly, he submitted that the evidence on record disclosed that the quantity of Charas found in the two envelopes by the Junior Scientific Officer (PW-1) was quite different from the quantity that was sealed in those two envelopes. As against 100 gms. said to have been recovered from the shoe on the right foot and sealed in envelope 'A', the quantity found by PW-1 was only 98.16 gms., whereas in envelope B in which 115 gms. of Charas is said to have been packed and sealed, the quantity found

was only 82.54 gms. This also raised a serious doubt as to whether the substance allegedly seized and sealed had been sent for chemical analysis. Lastly, it was submitted that the manner in which the seized substance was handled by the investigating agency did not rule out the possibility of manipulation, and that in the facts and circumstances of the case such manipulation was writ large in the face of the evidence on record.

7. Learned counsel appearing on behalf of the State submitted that the courts below have noticed the evidence on record and having found that the mandatory requirements of the Act had been fully complied with, accepted the evidence of the prosecution and did not attach much importance to minor discrepancies of inconsequential nature.

8. We shall first deal with the seal put on the envelopes soon after the alleged recovery of the Charas from possession of the appellant. The witnesses who have deposed on this aspect of the matter are PW-4, Inspector PSI Mhamal, PW-2, the panch witness and PW-1 Mahesh Kaissare, the Junior Scientific Officer who tested the said substance and found it to be Charas. So far as PW-4 is concerned, his evidence is to the effect that after recovery of the contraband, the same was placed in two envelopes and those two envelopes were sealed. According to him the seal bore the inscription "Anti Narcotic Cell, Panaji, Goa". This seal was usually kept in the custody of the police inspector A.N.C. Panaji, but the same was in the custody of PSI Thorat on that day as it was required in connection with the sealing of Charas recovered earlier in the day from P.C. Kulbi. PW4 claimed to have taken the seal from PSI Thorat and used it for sealing the two envelopes in which recovered substance was packed.

9. So far as PW-2 is concerned, he deposed that the recovery was made in his presence and the substance recovered was also packed and sealed in his presence. According to him the seal was of A.N.C. police station, but he added that he did not remember the exact letters. In the very next sentence, he stated that the seal was having the letters "ANCPS"

10. So far as PW-1 is concerned, he stated that the two envelopes marked 'A' and 'B' were received by him and he found the seal fixed on both the envelopes intact and tallied with the specimen seal impression sent along with the letter. On the specimen seal there were the letters "Anti Narcotic Cell" and he found similar seals affixed on the two envelopes A and B.

11. The evidence noticed above no doubt discloses a discrepancy as to the inscription on the seal. According to panch witness the inscription was ANCPS while according to PW-4 it was "Anti Narcotic Cell, Panaji, Goa". According to PW-1, it was "Anti Narcotic Cell". These discrepancies in the description of the seal, however, are not sufficient to hold that the case of the prosecution must be dis-believed. PW-2 while he described the inscription on the seal, himself stated that he was not sure as to what exactly was inscribed on the seal. At best he was stating from recollection. Similarly, the evidence of PW-4 discloses that there was only one seal of the Anti Narcotic Cell and even according to PW-1, the seal bore inscription "Anti Narcotic Cell". We do not attach much importance to this discrepancy in the description of the seal. The High Court also did not attach much importance to this discrepancy.

12. However, there appears to be substance in the other submissions urged on behalf of the appellant, namely, that the weight of the substance sealed in two envelopes was found to be different from the weight of the substance received by the laboratory as deposed to by PW-1. It is not disputed that from the shoe on the right foot 100 gms. of Charas was recovered, which was sealed in envelope 'A'. According to PW-1, the Junior Scientific Officer when that envelope was opened and the substance weighed it was found to be 98.16 gms. Similarly, from the shoe on the left foot 115 gms. of Charas was recovered which was packed and sealed in envelope B. But only 82.54 gms. of the substance was found in envelope B when the same was opened by PW-1. A similar submission was urged before the High Court and the High Court also found that this discrepancy could not be explained by the prosecution. The High Court observed that there was no doubt that the envelope B which was said to contain 115 gms. of Charas was found to contain only 82.54 gms. of Charas and this could not be considered to be a minor discrepancy. However, the High Court was of the view that even if this sample contained in envelope B was not considered against the appellant on account of discrepancy in the weight, since there was no material discrepancy in the weight of the Charas found in the other envelope A, the case against the appellant stood established on the basis of the Charas recovered, packed and sealed in envelope A.

13. It, therefore, concluded that the appellant could be held guilty for unauthorized possession of 98.16 gms. of Charas found in envelope 'A', if not for the total quantity of 180.70 gms. as charged.

14. We do not find it possible to uphold this finding of the High Court. The appellant was charged of having been found in possession of Charas weighing 180.70 gms. The Charas recovered from him was packed and sealed in two envelopes. When the said envelopes were opened in the laboratory by Junior Scientific Officer, PW-1, he found the quantity to be different. While in one envelope the difference was only minimal, in the other the difference in weight was significant. The High Court itself found that it could not be described as a mere minor discrepancy. Learned counsel rightly submitted before us that the High Court was not justified in upholding the conviction of the appellant on the basis of what was recovered only from envelope 'A' ignoring the quantity of Charas found in envelope 'B'. This is because there was only one search and seizure, and whatever was recovered from the appellant was packed in two envelopes. The credibility of the recovery proceeding is considerably eroded if it is found that the quantity actually found by PW-1 was less than the quantity sealed and sent to him. As he rightly emphasized, the question was not how much was seized, but whether there was an actual seizure, and whether what was seized was really sent for chemical analysis to PW-1. The prosecution has not been able to explain this discrepancy and, therefore, it renders the case of the prosecution doubtful.

15. This is not all. We find from the evidence of PW-4 that he had taken the seal from PSI Thorat and after preparing the seizure report, panchnama, etc. he carried both the packets to the police station and handed over the packets as well as the seal to Inspector Yadav. According to him on the next day, he took back the packets from the police station and sent them to PW-3, Manohar Joshi, Scientific Assistant in the Crime Branch, who forwarded the same to PW-1 for chemical analysis. In these circumstances, there is justification for the argument that since the seal as well as the packets were in the custody of the same person; there was every possibility of the seized substance being tampered with, and that is the only hypothesis on which the discrepancy in weight can be explained.

The least that can be said in the facts of the case is that there is serious doubt about the truthfulness of the prosecution case.

16. There is one other aspect of the matter. PW-2, the panch witness associated in this case appears to be a stock witness. The other panch witness has not been examined. PW-2 admitted in very clear terms that he was earlier associated in two other cases under N.D.P.S. Act as panch witness. In both those cases, PSI Thorat was the investigating officer. On 14 th December, 1994, he had been summoned by PSI Thorat and acted as a panch witness in the case against P.C. Kulbi, who as noticed earlier disclosed the complicity of the appellant. Thereafter, in the instant case, he was requested by PW-4 to act as a panch witness. It appears that PSI Thorat was also associated with this case as he was present with PW-4 when P.C. Kulbi was apprehended and thereafter when the appellant herein was apprehended and searched at the instance of the aforesaid Kulbi.

17. In view of the aforesaid features of the case, we find it unsafe to sustain the conviction of the appellant. We, therefore, allow this appeal and set aside the conviction and sentence of the appellant.

18. The appellant has been released on bail by an order of this Court. His bail bonds are discharged.