

Before Nirmal Yadav, J.

KHAZAN SINGH AND OTHERS,—*Appellants*

versus

UNION OF INDIA THROUGH INSPECTOR CUSTOMS,
JALALABAD, DISTRICT FEROZEPUR,—*Respondent*

CRIMINAL APPEAL NO. 168/SB OF 1993

23rd March, 2007

Narcotic Substances and Psychotropic Substances Act, 1985—S.21—Recovery of brown powder from appellants—Conviction—Confessional statements made before Customs Authorities—Whether admissible in evidence—Held, yes- S.108 of Customs Act gives power to Customs Officers to summon persons to give evidence and to produce documents and statements recorded by them are admissible in evidence—Prosecution proving its case beyond reasonable shadow of doubt—Nothing pointed out that any of authorities were in any way biased against appellants—No infirmity in judgment of conviction and sentence—Appeals dismissed.

Held, that all the appellants were arrested in some other cases and during interrogation, they disclosed about their involvement in the present case of drug trafficking. They were, therefore, handed over to the Customs Officers. Section 108 of the Customs Act gives powers to the Customs Officers to summon the persons to give evidence and to produce documents and the statements recorded by the Customs Officers are admissible in evidence. Accordingly statements made by accused-appellants are admissible in evidence. Two of the appellants refused to make statement before Customs Officer, therefore, an adverse inference has to be drawn against them.

(Para 15)

Further held, that the learned Additional Sessions Judge, Ferozepur was right in accepting the confessional statements of the appellants to be voluntary and those statements could form the basis of conviction. I do not find any illegality in the approach adopted by the learned Judge who has come to the conclusion that the prosecution has proved the case based upon the confession of the appellants under

Section 108 of the Evidence Act and the evidence of PW2 Shri Y. P. Chhibbar, Assistant Collector, Customs and PW3 Inspector Bakhtawar Singh.

(Para 16)

Bipan Ghai, Advocate, for the appellants in Crl.A.No. 168-SB of 1993.

Sandeep Punchhi, Advocate, for all the appellants in Crl.A. Nos. 204-SB to 206-SB of 1993.

D. D. Sharma, Advocate, *for the respondent.*

JUDGMENT

NIRMAL YADAV, J.

(1) These afore-mentioned four appeals have been directed against the judgment dated 14th May, 1993 passed by learned Additional Sessions Judge, Ferozepur,—*vide* which all the appellants were convicted under Section 21 of the Narcotic Substances and Psychotropic Substances Act, 1985, hereinafter referred to as the Act', and were sentenced to undergo rigorous imprisonment for ten years each and to pay a fine of Rs. One Lac each. In default of payment of fine, each appellant was directed to further undergo rigorous imprisonment for three years.

(2) Three complaints were filed against the accused-appellants by the Inspector, Customs Jalalabad and Ferozepur, in the following manner :—

Ist complaint against accused-appellants Khazan Singh, Wasakha Singh alias Gurmej Singh, Kundan Singh son of Mehla Singh, Dara Singh, Resham Singh and Kundan Singh son of Thakur Singh ;

2nd complaint against accused-appellants Fatta Singh and Mukhtair Singh ; and

3rd complaint against accused-appellants Puran Singh @ Punni.

(3) Briefly stated, the facts as per all the three complaints are that on the night intervening 6th/7th May, 1987 a Nakka was laid by the BSF Personnel on the international border of Pakistan at BOP

Chak Khewa. At about 3.30 A.M. some person carrying bags on their heads were seen crossing the border from Pakistan side. They were signalled to stop, where-upon they opened fire. In self-defence the Nakka party also opened fire. On being fired upon the miscreants threw their head loads and managed to escape towards Pakistan. On search of the area by Inspector Bakhtawar Singh, Company Commander, eight bags consisting of 224 packets weighing one kilogram each containing brown powder (presumably heroin) valuing Rs. 11 Crores 20 Lacs approximately and a pair of shoes, were recovered.

(4) On 23rd May, 1987, Wasakha Singh alias Gurmej Singh son of Phuman Singh, Kundan Singh son of Mehla Singh, Khazan Singh son of Bishan Singh, Dara Singh son of Hakam Singh, Resham Singh son of Thakur Singh and Kundan Singh son of Thakur Singh, appellants-accused, were arrested under the Arms Act, where all of them admitted their involvement in the trafficking of said brown powder. Therefore, these persons were handed over to the Custom Department on 24th May, 1987. The aforementioned six persons made confessional statements under Section 108 of the Custom Act, 1962, admitting their involvement in the present case by stating that they were of the same persons, who were bringing brown powder from Pakistan Border on the night intervening 6th/7th May, 1987 and on being challenged by the Nakka Party they had run away after throwing the contraband. Accordingly, they were arrested by the Custom Department under Sections 42 and 104 of the Customs Act.

(5) On 10th February, 1988 accused-appellant Fatta Singh was arrested by the Inspector Customs, Jalalabad and on interrogation he also confessed his involvement in respect of the seizure of 224 packets of brown powder. He also disclosed the involvement of appellants-accused Puran Singh and Mukhtiar Singh in the said case. Lateron Mukhtiar Singh and Puran Singh were arrested by the police and lodged in Central Jail, Ferozepur. On coming to know about them, Custom authorities sought permission of the Courts to record their statements. However, on 21st November, 1988 Mukhtiar Singh refused to give any statement and on 19th April, 1989 Puran Singh also refused to do so.

(6) The 224 packets of brown powder seized on 13th May, 1987 were handed over to the Custom Department by the BSF authorities. Four samples out of each packet i.e. 896 samples were drawn. The entire case property was taken into possession by the Customs Department after preparing necessary documents. One sample was handed over to Border Security Force Officer. Other sample was sent to Chemical Examiner, New Delhi. The third sample was kept with officer and deposited with the Customs House Malkhana, Amritsar. Fourth sample was sent to Deputy Director General, Narcotics. On being tested by the Chemical Examiner, New Delhi, each sample was found to contain "diacetylmorphine" in the shape of brown powder.

(7) As the three complaints related to one occurrence/seizure, therefore, all the accused named therein were tried together and by a common judgment were convicted and sentenced, as detailed above.

(8) Learned counsel for the appellants argued that none of the appellant was arrested at the spot alongwith the alleged incriminating article. The personnel of BSF are alleged to have seen some persons carrying bags on their heads crossing the border from Pakistan side. When they were signalled to stop, they opened fire on the personnel of BSF, who also returned the fire. In the process those persons threw the bags carrying on their heads and escaped from the spot. Thereafter the Company Commander got the eight bags recovered. Alleged occurrence took place on the night intervening 6th/7th May, 1987 and the appellants Wasakha Singh alias Gurmej Singh son of Phuman Singh, Kundan Singh son of Mehla Singh, Khazan Singh son of Bishan Singh, Dara Singh son of Hakam Singh, Resham Singh son of Thakur Singh and Kundan Singh son of Thakur Singh were arrested on 23rd May, 1987 under the Arms Act. On interrogation they disclosed their involvement in trafficking of brown powder and as such they were handed over to Customs Department. Similarly, Fatta Singh appellant was arrested on 10th February, 1988, who admitted his involvement in the present case. In his confessional statement it was disclosed that he was asked by appellants Puran Singh and Mukhtiar Singh to carry some bag from Pakistan Border for which he would be paid Rupees One Thousand. Learned counsel argued that the confession of co-accused has no probative value. It cannot be treated as substantive evidence and

be pressed into service when the Court is inclined to accept other independent evidence. Learned counsel further argued that according to PW 2 Y. P. Chhibbar, the confessional statements Ex. PA to Ex. PG were not recorded by him as he was not conversant with Punjabi. Those statements were recorded by Hoshiar Singh and were further scribed in Hindi by Mohinder Lal, Constable. However, neither Hoshiar Singh nor Mohinder Lal have been produced to depose in the witness box. The learned counsel further argued that confessional statements cannot be accepted since all the appellants have made specific statements that they were not conversant with Hindi and their thumb impressions were obtained on blank papers and writing work was done lateron. The learned counsel further argued that appellants No. 1 to 6 i.e. Wasakha Singh alias Gurmej Singh son of Phuman Singh, Kundan Singh son of Mehla Singh, Khazan Singh son of Bishan Singh, Dara Singh son of Hakam Singh, Resham Singh son of Thakur Singh and Kundan Singh son of Thakur Singh, did not know that the alleged recovered bags contained brown powder. In their statement it is mentioned that those bags contained some material like 'Maida'. None of these appellants was aware that the recovered material was a contraband. Even appellant Fatta Singh was not aware about incriminating article in the bag which he had to carry from the border. According to his statement he was asked to accompany other persons to the border from where he had to bring some material.

(9) Learned counsel further argued that statement recorded by the Customs Authorities under Section 108 of the Customs Act though admissible in evidence, but by virtue of Section 30 of the Evidence Act, it is not a substantive piece of evidence. Therefore, this cannot be the sole basis of conviction of appellants.

(10) With regard to accused-appellants Mukhtiar Singh and Puran Singh, the learned counsel argued that they did not make any confessional statements under Section 108 of the Customs Act, therefore, there is no evidence to connect them with the alleged recovery of the contraband. The only evidence against them is the confessional statement of the co-accused. Learned counsel, therefore, argued that confessional statement of the co-accused is not admissible and cannot be used to pass the conviction of these two appellants.

(11) The learned counsel argued that the case property was not produced at the time of trial and, therefore, the link evidence is missing. Learned counsel referred to the statement of PW3 Inspector Bakhtawar Singh who admitted in cross-examination that the case property has not been produced in the Court nor he had seen it. The learned counsel pointed out that there is no evidence whether the case property was kept in safe custody after its recovery. He again referred to the statement of PW3 Inspector Bakhtawar Singh who stated that from the place of recovery the case property was carried in the jeep at the instance of Shri J. K. Sharma to the Company Quarter, Jalalabad and on the next day Shri R. S. Mayall had come and taken the sample. The learned counsel pointed out that as per his statement the samples were taken on the next date, whereas a perusal of the recovery memo Ex. PK and Seizure Report Ex. PQ shows that these were prepared on 13th May, 1987. Details of weighing of the packets Ex. PM/1-8 and Ex. PN show that these documents were prepared on 13th May, 1987. It is argued that Shri R. S. Mayall who is stated to have got the custody of the contraband could not be produced having expired, therefore, there is no cogent evidence to prove that the samples as well as the case property remained in safe custody.

(12) On the other hand, learned counsel for Union of India argued that the confessional statements Ex. PA to Ex. PG of appellants Khazan Singh, Wasakha Singh *alias* Gurmej Singh, Kundan Singh son of Mehla Singh, Dara Singh, Resham Singh, Kundan Singh son of Thakur Singh and Fatta Singh made before the Customs Authorities are admissible in evidence. Learned counsel argued that it is well established that Customs Authorities have been vested with many powers of Police Officers while investigating the cognizable offence, however, they do not become Police Officers within the meaning of Section 25 of the Evidence Act so the confessional statements made by the appellants before the Customs Officers are admissible in evidence. He also argued that the confessional statements are further corroborated from the statement of Shri Y. P. Chhibber, Assistant Collector, Customs, who appeared as PW2. This witness was cross-examined at length by the defence counsel but nothing could be elicited to shatter the prosecution case. He further submitted that all the appellants have categorically admitted in their statements that it

was made clear to them by the Customs Officer that they were free to make the statements fully knowing that the said statements could be used against them.

(13) The prosecution case is mainly based on the confessional statements Ex. PA to Ex. PG made by the above mentioned seven appellants who have admitted that during the night intervening 6th/7th May, 1987 they had gone to the Pakistan Border to carry some bags from the border and in lieu thereof they were to receive Rs. 1,000 each. All the appellants were known to each other. Some of them are *interse* related also. Appellant Wasakha Singh has categorically stated that appellants Puran alias Punni and Mukhtiar Singh *alias* Mukhi had come to him on 6th May, 1987 at about 9/10 P.M. They told him that they require 6/7 persons for bringing eight bags containing 'Maida' like material from the Pakistan border and each of them would be paid Rs. 1,000. He further stated that Puran Singh who known to him earlier. Thereafter he called Khazan Singh, Kundan Singh son of Mehla Singh, Dara Singh, Resham Singh, and Kundan Singh son of Thakur Singh. They were also asked by Puran Singh and Mukhtiar Singh to accompany them of Pakistan Border for the above said purpose. Later on Fatta Singh also joined them. Thereafter all of them went towards Pakistan Border at midnight. On reaching the border, they found eight bags of material already lying and all of them carried one bag each. However, when they were at a distance of 300 to 350 yards from the border, they were challenged by the BSF personnel and they started firing. On hearing the shots, they threw all the bags and went towards village Dhaliwala.

(14) The argument of learned defence counsel to the effect that confession made before the Customs Officer is not admissible under the Evidence Act, cannot be accepted in view of the law laid down by the Apex Court by a Constitution Bench of the Apex Court in the case of **Illias versus Collector of Customs, (1) and Romesh Chandra Mehta versus State of West Bengal, (2)**. The above judgments have further been followed by the Apex Court in the case reported as **Pavunny versus Assistant Collector, (3)**. The Customs

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- (1) 1969 (2) S.C.R. 613
(2) 1969 (2) S.C.R. 461
(3) 1997 (2) R.C.R. (Criminal) 48.

Authorities have been invested with the power to arrest, power to detain, power to search or obtain search warrant and to collect evidence from unforeseen compliance with the provisions of Customs Act. They have been invested with many powers of Police Officers. However, the Customs Officers do not become Police Officers within the meaning of Section 25 of the Evidence Act so the confessional statements made by the accused persons before them are admissible in evidence. Admittedly, in the present case appellants were initially arrested by the Police and on interrogation when they disclosed their involvement in the present case, they were handed over to the Customs Officers, who had completed the entire formalities.

(15) From a careful perusal of the entire evidence it is seen that all the appellants were arrested in some other cases and during interrogation, they disclosed about their involvement in the present case of drug trafficking. They were, therefore, handed over to the Customs Officers. Section 108 of the Customs Act gives powers to the Customs Offices to summon the persons to give evidence and to produce documents and the statement recorded by the Customs Officers are admissible in evidence. Accordingly statements Ex. PA to Ex. PG made by accused-appellants Khazan Singh, Wasakha Singh *alias* Gurmej Singh, Kundan Singh son of Mehla Singh, Dara Singh, Resham Singh, Kundan Singh son of Thakur Singh and Fatta Singh and admissible in evidence. Two of the appellants namely, Puran Singh and Mukhtiar Singh refused to make statement before Customs Officer, therefore, an adverse inference has to be drawn against them.

(16) The confession of the co-accused can be pressed into service normally when there is other independent evidence and the Court feels the necessity of seeking for an assurance in support of its conclusion deducible from the said evidence. In the criminal trial there is, of course, no scope for applying the principle of moral conviction, if there is no other convincing evidence against the accused person. It is also true that in criminal trial, the trial Court and the Appellate Court should martial the facts and reach conclusion on the basis of those facts. On scrutinising the evidence; facts of the case and going through the reasoning given by the trial Court, I am of

the view that the learned Additional Sessions Judge, Ferozepur was right in accepting the confessional statements of the appellants Khazan Singh, Wasakha Singh *alias* Gurmej Singh, Kundan Singh son of Mehla Singh, Dara Singh, Resham Singh, Kundan Singh son of Thakur Singh and Fatta Singh, Ex PA to PG, to be voluntary and those statement could form the basis of conviction. I do not find any illegality in the approach adopted by the learned Judge who has come to the conclusion that the prosecution has proved the case based upon the confession of the appellants under Section 108 of the Evidence Act and the evidence of PW 2 Shri Y. P. Chhibbar and PW 3 Inspector Bakhtawar Singh.

(17) Nowadays, the even-growing menace of illicit drug trafficking and drug abuse has risen to such an alarming extent that the global community must appraise itself of the sobering fact that a considerable portion of the society is predominantly engaged in the commerce of self-destruction. During recent years new drugs of addiction which are commonly known as psychotropic substances have appeared on the scene and posed serious problems endangering the health and safety of the citizens, seriously eroding the morale of the society. Drug abuse and drug addiction are corroding the health fabric of the society. An offence relating to narcotic drugs or psychotropic substances is more heinous than a culpable homicide because the latter affects only an individual while the former affects and leaves its deleterious impact not only on the family of the addict but also on the society, besides shattering the economy of the nation as well. The object should be to protect the society and to deter the criminal in achieving the avowed object of law by imposing appropriate sentence. It is, therefore, expected that the courts would operate the sentencing system so as to impose such sentence which reflects the conscience of the society and the sentencing process has to be stern where it should be. A shockingly large number of criminals go unpunished, mainly, for want of strict compliance of various mandatory provisions of the Act, thereby encouraging the criminals and shaking the faith of the general public in the system's creditability. If steps are not immediately taken to curb this nefarious menace, then it would be too late to save our coming generations from its ill-effects. It is high time for all concerned, be it a State

mechanism, NGOs, social workers or any other public or private organisation, to agitate against the devastating effects of drug abuse on individuals and society and make all-out efforts to counter the drugs course as a matter of urgency, with representation at all levels. The State should examine the feasibility of a Special anti-drug force to interdict the supply and help eliminate illicit trafficking of drugs. A system should be established to identify the methods and routes used for trafficking the illicit narcotic drugs and psychotropic substances.

(18) The learned defence counsel pointed out towards the infirmity with regard to link evidence. However, taking into consideration the confessional statements of the appellants themselves and the fact that nothing could be pointed out by the defence counsel that any of the authorities were in any way biased against the appellants the prosecution has been able to prove its case beyond reasonable shadow of doubt. Secondly, the alleged contraband could not be foisted upon the appellants keeping in view the heavy recovery of brown powder, cost of which was assessed approximately in the international market at Rs. 11 crores 20 lacs. The contravention and offences under the NDPS Act are committed in an organised manner under absolute secrecy. This kind of crime, of course, is upsetting the economy of the country and must be curbed with a heavy hand. Therefore, keeping in view the confessional statements of appellants Khazan Singh, Wasakha Singh *alias* Gurmej Singh, Kundan Singh son of Mehla Singh, Dara Singh, Resham Singh, Kundan Singh son of Thakur Singh and Fatta Singh, admitted their guilt; stating that appellants Mukhtiar Singh and Puran Singh were the persons who had asked them to bring the material from Pakistan border; their confessional statements being further corroborated by the recovery of 224 packets of brown powder and in the absence of any cogent evidence to rebut their testimony, no infirmity can be found with impugned judgment of conviction and order of sentence.

(19) In view of the above discussion, there is no merit in the appeals filed by the appellants, which are hereby dismissed.