

**NON-REPORTABLE****IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION****CRIMINAL APPEAL NO. 878 OF 2019****AJAY KUMAR GUPTA****... APPELLANT*****VERSUS*****UNION OF INDIA****... RESPONDENT****J U D G M E N T****ABHAY S. OKA, J.****FACTUAL ASPECTS**

1. The appellant is accused no.2. Along with other co-accused, he was prosecuted for the offences punishable under the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short, 'the NDPS Act'). The case of the prosecution is that the Narcotics Control Bureau (for short, 'NCB') received secret information on 21st December 2013 that a consignment of pentazocine, a psychotropic substance, was being transported illegally from Hajipur to Lucknow by train for being sold in the market as an intoxicating item. The NCB team mounted surveillance near the parcel house of Hajipur station. When accused no.1 - Jasvinder Singh reached there, he was intercepted. According to the prosecution case, accused no.1 identified the consignment he had booked from the railway parcel house. During the search of the booked consignment,

30 cartons of pentazocine (Fortwin injections) manufactured by Ranbaxy company were found. A statement of accused no.1 was recorded under Section 67 of the NDPS Act. He admitted that he used to purchase medicines from Patna and sell them in Lucknow, Uttar Pradesh. He claimed that he bought Fortwin injections from the appellant-accused no.2 and one Arun Singh on several occasions.

2. Even the appellant's statement under Section 67 of the NDPS Act was recorded in which he stated that he runs a medical shop in Katra Market, Govind Mitra Road, Patna, under the name and style of M/s Mangalam Drug Agency. He disclosed that he had a valid licence issued by the Office of Controller of Drugs, Bihar. He stated that accused no.1 came to his shop and demanded 40 cartons of Fortwin injections. He could provide only 30 cartons against payment of cash. The consignment of 30 cartons was obtained by the appellant from accused no.3 – Sanjay Kumar, who was also running a medical store in the name of M/s Maheshwari Pharma. On the request made by the appellant, accused no.3 sent 30 cartons of Fortwin injections to accused no.1. The case of the prosecution is that the appellant produced his drug licence before the officers of NCB. On trial, the Special Court convicted the appellant and accused nos.1 and 3 for the offences punishable under Section 22(c) and Section 29 of the NDPS Act. For the offence punishable under Section 22(c), the appellant was sentenced to undergo rigorous imprisonment for 10 years and to pay a fine of Rs. 1,00,000/-. Separate punishment was not imposed

for the offence punishable under Section 29 of the NDPS Act. The conviction of the appellant has been confirmed by the High Court by the impugned judgment.

SUBMISSIONS

3. The first submission of the learned senior counsel appearing for the appellant is that the charge framed against the appellant and accused no.1 was only for the offence punishable under Section 22(c) of the NDPS Act. The allegation, as stated in the charge, was that on 21st December 2013, the appellant and accused no.1 gave cartons of Fortwin injections for interstate transportation without any valid licence and in contravention of Section 8(c) of the NDPS Act. He submitted that no charge was framed against the appellant for the offence punishable under Section 29 of the NDPS Act. He submitted that the finding of the High Court is that the appellant has been prosecuted and convicted for having sold contraband to an unauthorised person, leading to the presumption that the contraband was sold to be used as an intoxicant. He submitted that there is no evidence to show that the contraband contained in the consignment booked by the accused no.1 was purchased from the appellant. He submitted that the Courts have placed reliance on the statement of the appellant recorded under Section 67 of the NDPS Act, which is not admissible in evidence as held by this Court in the case of ***Tofan Singh v. State of Tamil Nadu***¹. He submitted that apart from prejudice caused to the appellant on account of non-framing of proper

¹ (2021) 4 SCC 1

charge, the allegation of conspiracy under Section 29 of the NDPS Act was not put to the appellant in his statement recorded under Section 313 of the Code of Criminal Procedure, 1973 (for short, 'CrPC'). He submitted that unless a charge of conspiracy under Section 29 was proved, the appellant could not be punished under Section 22(c) of the NDPS Act.

4. The learned senior counsel appearing for the respondent submitted that the accused no.3, who examined himself as a defence witness, placed on record invoices issued to the appellant for sending the Fortwin injections. She submitted that the fact that 30 cartons of Fortwin injections were supplied by accused no.3 at the instance of the appellant has been established through evidence. She submitted that there is enough evidence on record to show that the contraband was supplied to accused no.1 at the instance of the present appellant by the accused no.3.

CONSIDERATION OF SUBMISSIONS

5. We have perused the notes of evidence and considered the submissions. Under Section 8(c), there is a complete prohibition on possessing and transporting any narcotic drug or psychotropic substance. Section 22 of the NDPS Act reads thus:

“22. Punishment for contravention in relation to psychotropic substances.—Whoever, in contravention of any provision of this Act or any rule or order made or condition of licence granted thereunder, manufactures, possesses, sells, purchases, transports, imports inter-

State, exports inter-State or uses any psychotropic substance shall be punishable,—

(a) where the contravention 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) where the contravention 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) where the contravention 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.”

In this case, the contravention involves commercial quantity, for which there is no dispute. Section 22 is attracted when, in contravention of any provisions of the NDPS Act, anyone possesses or transports a psychotropic substance.

6. Section 29 reads thus:

“29. Punishment for abetment and criminal conspiracy.—(1) Whoever abets, or is a party to a criminal conspiracy to commit, an offence

punishable under this Chapter, shall, whether such offence be or be not committed in consequence of such abetment or in pursuance of such criminal conspiracy, and notwithstanding anything contained in Section 116 of the Indian Penal Code (45 of 1860), be punishable with the punishment provided for the offence.

(2) A person abets, or is a party to a criminal conspiracy to commit, an offence, within the meaning of this section, who, in India, abets or is a party to the criminal conspiracy to the commission of any act in a place without and beyond India which—

(a) would constitute an offence if committed within India; or

(b) under the laws of such place, is an offence relating to narcotic drugs or psychotropic substances having all the legal conditions required to constitute it such an offence the same as or analogous to the legal conditions required to constitute it an offence punishable under this Chapter, if committed within India.”

7. In the facts of the case, the consignment was booked by accused no.1, and therefore, he was found to be transporting the psychotropic substance in contravention of Section 8(c) of the NDPS Act. There is no allegation against the appellant of transporting the contraband. The consignment was booked in the name of the accused no.1 as per the prosecution case. Therefore, unless it is proved that the appellant had supplied the consignment to accused no.1 or was a part of a criminal

conspiracy to commit an offence under Section 22(c), the appellant cannot be punished.

8. Perusal of the evidence of accused no.3, who was examined as a defence witness, shows that he was carrying on the business of M/s Maheshwari Medical in his wife's name. He stated that he issued invoices for sending Fortwin injections to the appellant. However, there is no evidence on record to show that accused no.3 procured the contraband that is the subject matter of the prosecution and handed it over to the appellant or accused no.1.

9. We may note that the Trial Court and High Court have relied upon the appellant's statement under Section 67 of the NDPS Act. In paragraph 158 of the decision of this Court in the case of **Tofan Singh¹**, this Court held thus:

“158. We answer the reference by stating:

158.1. That the officers who are invested with powers under Section 53 of the NDPS Act are “police officers” within the meaning of Section 25 of the Evidence Act, as a result of which any confessional statement made to them would be barred under the provisions of Section 25 of the Evidence Act, and cannot be taken into account in order to convict an accused under the NDPS Act.

158.2. **That a statement recorded under Section 67 of the NDPS Act cannot be used as a confessional statement in the trial of an offence under the NDPS Act.”**

(emphasis added)

Therefore, the appellant's statement recorded under Section 67 of the NDPS Act is not admissible in evidence and cannot be read in evidence.

10. The High Court, in paragraph 37 of the impugned judgment, has noted that a statement of the transporter ought to have been recorded to prove that the delivery of consignment containing contraband was made by accused no.3 to the appellant's shop. In fact, the person who allegedly transported the contraband from accused no.3 to the appellant was a crucial witness. However, the prosecution has withheld the evidence of this witness from the Court. Hence, an adverse inference must be drawn against the prosecution. In the statement of accused no.1, under Section 67 of the NDPS Act, he stated that he purchased Fortwin injections from the appellant and one Arun Singh several times. However, no investigation has been carried out against Arun Singh.

11. There is no recovery from the appellant of any incriminating material. There is no evidence to show that the contraband tried to be transported by accused no.1 by railway parcel was delivered by or on behalf of the appellant to accused no.1. There is no evidence of any conspiracy against the appellant. Therefore, the respondent has not established the offences punishable under Sections 22(c) and 29 of the NDPS Act against the appellant beyond a reasonable doubt.

12. It is necessary to refer to the charge framed, which reads thus:

“ **Case No. C2A1 of 2013**

Name of Accused hereby charge you (1)
Jasavinder Singh @ Kooki

Person (2) Ajay Kumar Gupta

That you on or about the 21st day of December, 2013 at 7.50 to 10.30 P.M., at Parcel house Rly. Station, Platform No.1, Hajipur Junction on P.S. Hajipur District Vaishali Fortwin (12MIX 1 ml) containing batch No. 9070238/Keptin 60, Gulabi and white packets in each carton for transportation the same interstate without any valid license and in contravention of S. 8(c) of the NDPS Act. You thereby committed an offence.

And that hereby committed an offence under 22(c) of the N.D.P.S. Act punishable of the Indian Penal code and within any cognizance.

And hereby direct that you be tried by me on the said charge.”

In the charge, there is no reference to the allegation of commission of an offence under Section 29 of the NDPS Act.

13. However, it is not necessary for us to go into the question of whether non-framing of charge under Section 29 of the NDPS Act has resulted in the failure of justice. The reason is that there is absolutely no legal evidence on record to show that the contraband attempted to be transported by accused no.1 by a railway parcel was supplied to him by the appellant. There is no evidence of the appellant's participation in any conspiracy.

14. Therefore, the conviction of the appellant cannot be sustained. Accordingly, we set aside the impugned judgments and acquit the appellant of all charges against him in Case No. C2 A 01/2013 before the Court of Special Judge, Vaishali at Hajipur.

15. Accordingly, the appeal is allowed. As the appellant is on bail, his bail bonds stand cancelled.

.....J.
(Abhay S. Oka)

.....J.
(Augustine George Masih)

**New Delhi;
August 22, 2024.**