

High Court of Madhya Pradesh, Jabalpur
Bench at Indore

BEFORE

**HON'BLE SHRI JUSTICE SUBODH ABHYANKAR &
HON'BLE SHRI JUSTICE SATYENDRA KUMAR SINGH**

ON THE 2ND OF AUGUST, 2022

Criminal Appeal No.1173/2015

Between: -

Yunus S/o Rehmat Shah
Age- 24 years, Occupation- Agriculture,
R/o Balim Kasba Dhoratanda,
Police Station Bhojipura, District **Bareilly** (UP)

(By Shri Akhilesh Kumar Saxena, Advocate)

.....APPELLANT

AND

The State of Madhya Pradesh
Through Police Station **Bhavgarh**,
District **Mandsaur** (MP)

(By Shri Akash Sharma, Government Advocate)

.....RESPONDENT

.....
Reserved on: - 16.06.2022
Delivered on: - 02.08.2022
.....

This CRIMINAL APPEAL coming on for hearing / judgment this day, **Hon'ble Shri Justice Subodh Abhyankar**, passed the following:

JUDGMENT

This appeal under Section 374 (1) of the Code of Criminal Procedure, 1973 has been filed by the appellant being aggrieved of his conviction and sentence.

The appellant stands convicted by the impugned

judgment dated 28.07.2015, passed by the learned Special Judge (under NDPS Act), Mandsaur District Mandsaur (MP) in Special Sessions Trial No.09/2012, whereby the learned Judge of the trial court has sentenced him, as mentioned herein below: -

Accused	Conviction	Sentence	Fine Amount	Sentence in default of payment of fine
Yunus s/o Rahmat Shah	8 r/w 15 (c) of NDPS Act	12 years Rigorous Imprisonment	Rs.1,00,000/-	1 Year RI

2. In brief, the facts of the case are that on 23.10.2011 at around 04.30 PM in the evening, the Police Mandsaur apprehended a truck bearing registration number UP-25 AT-5188 at Gram Dhandhoda Phanta on Bhavgarh-Dalauda Road. Although the truck did not initially spot, but it was chased by the Police in a Jeep and was stopped. After stopping the truck, two person got down and ran away from the spot, however, the Driver of the vehicle was caught then and there only, who informed his name to be Yunus S/o Rahmat Shah (the present appelland) and the person who ran away from the spot were Nasir and Jahid, who are still at large.

3. After giving the due information to the Driver, the truck was searched by PW-15 R.P. Rana, Sub Inspector and it was found that 199 white bags containing poppy straw, were surreptitiously being transported hidden beneath the 101 bags of fodder, which was seized and after mixing the contents of these bags and making a homogeneous mixture of poppy straw, its samples were taken and were sent to the Forensic Science

Laboratory. The quantity of poppy straw was found to be 39 quintal and 80 kilogram.

4. After the investigation was completed, the charge sheet was filed and the appellant was tried before the learned Special Judge (under NDPS Act) Mandsaur, District Mandsaur (MP), who vide his judgment dated 28.07.2015 has convicted the appellant, as aforesaid; and being aggrieved, this appeal has been preferred by the appellant.

5. Shri Akhilesh Kumar Saxena, learned counsel for the appellant has submitted that the prosecution has not proceeded with the seizure of the contraband, in accordance with the provisions of the Narcotic Drugs & Psychotropic Substance Act, 1985 (herein after referred to as the Act), especially Sections 42, 57 as also Sections 50, 55 and 52.

6. In the alternative, counsel for the appellant has submitted that the appellant has been sentenced to twelve years imprisonment and he has already completed ten years and seven months as of now; and thus, the sentence awarded to him (which is twelve years RI) be reduced to ten years RI only, which is the minimum sentence under the Act.

7. In support of his contention, counsel has also relied upon the decision dated **25.02.2021** rendered by a Division Bench of this Court in **Criminal Appeal No.1776/2016 (Rakesh v. State of Madhya Pradesh)** wherein this Court has reduced the sentence from eleven years to ten years, the minimum prescribed sentence

under Section 18 (b) of the Act; and in default of payment of fine, his sentence was reduced to six months from one year.

8. Shri Akash Sharma, learned Government Advocate for the respondent / State, on the other hand, has opposed the prayer and it is submitted that all the mandatory provisions of the Act have been complied with by the prosecution and so far as the sentence passed against the appellant is concerned, in the case of Rakesh (supra), the contraband was found to be 4.500 kilogram of opium, the commercial quantity of which is 2.5 kilogram, whereas in the present case, the contraband seized is 39 quintal 80 kilogram of poppy straw, which is far more than the commercial quantity (which is 50 kilogram).

9. Counsel for the respondent / State has also relied upon a decision dated **20.09.2021** rendered by a Division Bench of this Court in **Criminal Appeal No.1409/2016 (Pappuram @ Bhagwanaram S/o Hanumanaram v. State of Madhya Pradesh)** and **Criminal Appeal No.1462/2016 (Mukesh S/o Mangilal Gurjar v. State of Madhya Pradesh)** as also on a Supreme Court judgment in the case of **Gurdeep Singh v. State of Punjab** reported in **2021 SCC Online SC 285**, wherein the Supreme Court has observed that the sentencing policy should always be commensurate to the gravity of the offence; and in the present case, the quantity of the contraband is much more than the commercial quantity of poppy straw. Thus, it is submitted that no case for interference is called for and the appeal deserves dismissal.

10. Heard, the learned counsel for the parties and perused the record. A perusal of the evidence which has been brought on record by the prosecution, and the undisputed facts of the case have lead this Court to form only one opinion, that the prosecution has miserably failed to prove its case even before onus is shifted to the appellant / accused to rebut the presumption, as provided under Section 35 of the NDPS Act.

11. After closely scrutinizing the record, this Court is of the considered opinion that the manner in which the sampling has been done in the present case belies the very essence of due process and of fair play, as admittedly 199 bags of poppy straw have been alleged to have been seized by the prosecution along with 100 bags of fodder. The prosecution has come up with a specific case that the samples of the aforesaid contraband i.e. 199 bags of poppy straw were collected only after all of them were emptied on a *tirpal* (canvas) and after mixing them homogeneously, two samples, each of 500 grams, namely Article A-1 and Article A-2 were sealed and the remaining poppy straw was again re-packed in the bags and were sealed.

12. This fact can also be ascertained from the deposition of PW-1 Babulal Chouhan, Head Constable, who was also a party to such seizure and relevant extracts of para 3 of his deposition reads, as under: -

“3- ट्रक की तलाशी लेने पर ट्रक की बाड़ी में युनुस का ड्रायविंग लायसेंस व बिल्टी मिली थी। फिर ट्रक में भरे हुए प्लास्टिक के बोरों को

नीचे उतारकर चापडा वाले कट्टे अलग कर डोडाचूरा वाले कट्टों कुल 199 को समरस किया। हमराह फोर्स ने उक्त कट्टों का परीक्षण करने पर डोडाचूरा पाया। फिर उक्त ढेर में से 500-500 ग्राम के दो सैंपल निकालकर उन्हें प्लास्टिक की थैली में भरकर मुंह प्रेस किया व सीलबंद किया व उक्त डोडाचूरा को वापस उन्हीं कट्टों में भरकर मशीन द्वारा सिलकर थाने की सील से सीलबंद कर व तौल किया। फिर एस.आई. राणा साहब द्वारा कागज का सील का नमूना बनाया गया। फिर सीलबंद किए गए डोडाचूरे के कट्टों के मुँह पर आर्टिकल ए-1 से चिन्हित किया गया।”

13. It is apparent from the aforesaid procedure adopted by the Investigating Officer that as separate samples were not taken from each and every one of such 199 bags containing poppy straw. As per the panchanama Ex.P/3, out of these 199 bags, 198 bags were of 20 kg each whereas one bag was of 19 kg only but in such scenario, it cannot be presumed that each one of such 199 bags had poppy straw in them. It might be possible that only 1 or 2 or more of such bags had poppy straw in them but it can never be found out as even before their separate sampling, all the bags were mixed together which has produced the mixture of poppy straw weighing 39 quintals and 79 kilograms and out of this mixture, samples have been drawn as per Ex.P/3.

14. In view of the same, even if the final chemical analyst's report Ex.P/104 reveals that the samples had contents of poppy straw, it is difficult for this Court to hold that each one of the 199 bags seized by the prosecution at the time of incident contained poppy straw and nothing else.

15. In view of the aforesaid discussion, this Court is of the

considered opinion that the prosecution has failed to prove its case beyond reasonable doubt against the appellant; as at the most, it can be presumed that only one such bag, weighing 19 or 20 kg had poppy straw and none else, which is also the quantity lesser than the commercial quantity which is 50 kg. As per the NDPS Act and for such quantity, the petitioner has already undergone more than 10 years of incarceration which is more than the sentence provided for in case where the quantity is less than commercial. Thus, the appellant is entitled to the benefit of doubt and his sentence is reduced to 8 years' imprisonment and under the circumstances, in default of payment of fine also he is sentenced to the period already spent by him in jail over and above the 8 years of incarceration. Thus, as the appellant has already suffered his entire sentence, he be released forthwith, if not required in any other criminal case.

Consequently, Criminal Appeal No.1173/2015 stands **partly allowed and disposed of.**

Let a copy of this judgment be sent to the trial Court for information and necessary compliance.

(Subodh Abhyankar)
Judge

(Satyendra Kumar Singh)
Judge