SUPREME COURT OF INDIA

Jitendra

Vs.

State of M.P

Crl.A.Nos.1318-1319 of 2002

(K. G. Balakrishnan and B. N. Srikrishna JJ.)

18.09.2003

JUDGEMENT

B.N.Srikrishna, J.

1. These two appeals by special leave are directed against a common judgment of the Madhya Pradesh High Court rendered in Criminal Appeal No. 411/2000 and Criminal Appeal No. 414/2000 convicting the appellants herein, Jitendra s/o Vijay Narayan @ Virendra Raghuwanshi and Smt. Sheela @ Chandrawati, under the *Narcotic Drugs and Psychotropic Substances Act, 1985*.

2. According to the prosecution case, Inspector Rajendra Pathak (PW 7) of Police Station, Datia, received secret information at 5 p.m. on 12th August, 1999 that in front of the house of one Rampyari Bilganiya her tenant was standing with a scooter without number plate and was likely to transport charas and opium. S.D.O.(P) Angad Singh (PW8) was present at the police station when this information was received. A constable was sent to call two independent witnesses Sandeep (PW2) and Mukesh (PW3). The police party thereafter left for the house of Rampyari at 5.30 p.m. According to the prosecution's version, accused Jitendra (Appellant in appeal No. 411/2000) was standing in front of the house of Rampyari along with a scooter. On a request by the Police Officer that he may be permitted to search the dicky of the scooter, and after being apprised that the search may be given either to the Police Officer present or to the Magistrate, the accused Jitendra agreed that the search may be taken by the Police Officer. The Police Officer opened the dicky with a key supplied by Jitendra. This search resulted in recovery of five packets of charas in a polythene bag along with currency notes worth Rs. 20,000/-. The charas weighed one kilogram out of which two samples of 100 grams each were taken out and sealed. Thereafter, the police party accompanied by a lady constable Pushpa (PW5), who was called from the police station, entered the house of Smt. Sheela @ Chandrawati, accused Jitendra's mother. The house of Smt. Sheela was searched and one kilogram of ganja was recovered from the house. That was seized by a seizure memo. Two samples of 200 grams were taken out and sealed as per the panchanama. The samples were sent to the Forensic Science Laboratory, Sagar for chemical examination. The Chemical Examiner opined that the samples were charas and

ganja respectively. The accused were charged with offences under Section 8 read with Section 18 and Section 8 read with Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as 'the NDPS, Act'). The Special Judge after trial acquitted both the accused of the charge under Section 8 read with Section 18 but convicted the accused Jitendra and Sheela for offences under Section 20 (b) of the NDPS, Act. After a hearing on the question of punishment, appellant Jitendra was sentenced to rigorous imprisonment for 10 ten years and fine of Rs. one lakh and in default to a further sentence of two years rigorous imprisonment. The Appellant Sheela @ Chandrawati was sentenced to rigorous imprisonment for three years with a fine of Rs. 5000/- and in default to a further term of rigorous imprisonment of six months.

3. Both the convicted accused appealed to the High Court. The High Court maintained the convictions and sentence imposed upon Jitendra and dismissed his appeal. As far as Smt. Sheela was concerned, the High Court reduced the sentence of imprisonment to the period undergone in custody, which was about 14 months, and reduced the fine to Rs. 2,000/- by partly allowing her appeal.

4. The learned counsel for the appellants strongly urged that the High Court has completely missed the crucial issue that was urged on behalf of the accused. He pointed out that this was a strange case where the material objects viz. one kilogram charas alleged to have been seized from the custody of Jitendra, and one kilogram ganja alleged to have been seized from the possession of Jitendra's mother, accused Sheela, were not at all produced at the trial. Though it was the case of the prosecution that the recovered articles of drugs were kept in the Malkhana, neither were the material objects produced in the trial, nor was the Malkhana Moharir examined during the trial to prove that the packets in which the samples were sealed had remained in Malkhana from the time of their receipt to the time of their despatch to the Forensic Science Laboratory. He urged that there was no material whatsoever before the trial Court to prove that the samples which were despatched to the Forensic Science Laboratory were actually drawn from the drugs alleged to have been seized from the two accused. The learned counsel also urged that the provisions of Section 52A of the NDPS, Act are mandatory and that there was a violation of these provisions in the matter of drawing of samples as the samples had been drawn without the requisite order of the Magistrate as contemplated under Section 52A. The learned counsel also urged certain other legal issues, but it is not necessary to consider them, since, in our view, the accused are entitled to succeed on the first contention of the learned counsel.

5. The evidence to prove that charas and ganja were recovered from the possession of accused consisted of the evidence of the police officers and the panch witnesses. The panch witnesses turned hostile. Thus, we find that apart from the testimony of Rajendra Pathak (PW7), Angadsingh (PW8) and Sub-Inspector D. J. Rai (PW6), there is no independent witness as to the recovery of the drugs from the possession of accused. The charas and ganja alleged to have been seized from the possession of the accused were not even produced before the trial Court, so as to connect it with the samples sent to the Forensic Science Laboratory. There is no material produced in the trial, apart from the interested testimony of police officers, to show that the charas and ganja were seized from the possession of the

accused or that the samples sent to the Forensic Science Laboratory were taken from the drugs seized from the possession of the accused. Although, the High Court noticed the fact that the charas and ganja alleged to have been seized from the custody of the accused had neither been produced in the Court, nor marked as articles, which ought to have been done, the High Court brushed aside the contention by observing that it would not vitiate the conviction as it had been proved that the samples were sent to the Chemical Examiner in a properly sealed condition and those were found to be charas and ganja. The High Court observed, "non-production of these commodities before the Court is not fatal to the prosecution. The defence also did not insist during the trial that these commodities should be produced." The High Court relied on Section 465 of the Cr. P.C. to hold that non-production of the material object was a mere procedural irregularity and did not cause prejudice to the accused.

6. In our view, the view taken by the High Court is unsustainable. In the trial it was necessary for the prosecution to establish by cogent evidence that the alleged quantities of charas and ganja were seized from the possession of the accused. The best evidence would have been the seized materials which ought to have been produced during the trial and marked as material objects. There is no explanation for this failure to produce them. Mere oral evidence as to their features and production of panchanama does not discharge the heavy burden which lies on the prosecution, particularly where the offence is punishable with a stringent sentence as under the NDPS, Act. In this case, we notice that panchas have turned hostile so the panchanama is nothing but a document written by the concerned police officer. The suggestion made by the defence in cross-examination is worthy of notice. It was suggested to the prosecution witnesses that the landlady of the house in collusion with police had lodged a false case only for evicting the accused from the house in which they were living. Finally, we notice that the Investigating Officer was also not examined. Against this background, to say that, despite the pancha witnesses having turned hostile, the non-examination of the Investigating Officer and non-production of the seized drugs, the conviction under the NDPS, Act can still be sustained, is far-fetched.

7. The learned counsel for the appellants brought to our notice two more facts. The High Court seems to have relied on a copy of the letter dated 14th August, 1999 written by the Superintendent of Police, Datia to the Director, State Forensic Laboratory, Sagar and placed reliance thereupon, although this was not a document produced during the trial and proved according to law. The High Court commented that the prosecution had failed to exhibit the letter during the trial and that the trial Court was not vigilant in this respect. In the absence of anyone affirming the correctness of the contents of the letter, the High Court has placed reliance on the contents of the letter merely on the ground that the said document was mentioned at serial No. 9 in the charge-sheet, and presumably its copy must have been supplied to the accused. This is another lacuna, noticeable in the judgment of the High Court.

8. The learned counsel for the appellant drew our attention to the final report dated 3-10-1999 submitted under Section 173 of Cr. P.C., from the original file. We notice something peculiar here. In the final report, in Column No. 16, headed "result of laboratory analysis", it is stated "report of FSL, Sagar is awaited". Interestingly, the report of the State Forensic

Laboratory, Sagar is dated 30-8-1999 (Ex. P/17) certifying that the packets 'A', 'B' and 'C' sent to the laboratory contained charas and ganja. It appears strange to us that the final report submitted under Section 173 of Cr. P.C. on 3-10-1999, on which the charge-sheet was based, was submitted by the police officer concerned either without being aware of or without reading the report of the Forensic Science Laboratory. Or else, the Forensic Science Laboratory's report is ante-dated. This is another circumstance which militates strongly against the prosecution.

9. Taking the cumulative effect of all the circumstances, it appears to us that the material placed on record by the prosecution does not bring home the charge beyond reasonable doubt. We are of the view that upon the material placed on record it would be unsafe to convict the appellants. They are certainly entitled to the benefit of doubt.

10. In the result, we allow the appeals, set aside the judgment of the High Court and the trial Court and quash the convictions of the appellants. The appellant-Jitendra is directed to release from custody forthwith, if not required in any other case.

Appeal allowed.