SUPREME COURT OF INDIA

Ashok @ Dangra Jaiswal

Vs.

State of M.P.

Crl.A.No.1438 of 2008

(Aftab Alam and R.M.Lodha,JJ.,)

05.04.2011

JUDGMENT

Aftab Alam,J.,

1. The appellant stands convicted under Sections 8/21(b) of the Narcotics Drugs & Psychotropic Substance Act, 1985 (hereinafter referred to as "the NDPS Act") and sentenced to undergo rigorous imprisonment for 7 years and a fine of Rs.25,000/- with the direction that in default of payment of fine, he would undergo rigorous imprisonment for a further period of one year.

2. On March 8, 2005, at about 3.30 p.m. one Anil Kumar Jharkhadia (PW.10), Town Inspector, Police Station Kareli received information that the appellant, the owner of Satyanarain Talkies is engaged in selling of smack powder (heroin in common parlance) from his cinema hall. After completing the formalities, the police party proceeded to the cinema hall where the Town Inspector, complying with the mandate of the law, subjected the appellant to a personal search. The search, made under the Search Memo, Exhibit P.17, yielded three packets from the pocket of the `kurta' worn by the appellant. The plastic packets contained smack powder, the total weight of which was 175 grams. The suspected narcotic recovered from the appellant was seized under seizure memo, Exhibit P.22. From the seized powder, two samples of five grams each were taken and were put in two separate sealed packets marked as Article A and A1. The remainder 165 gram was put in a separate sealed packet marked as Article A-2.

3. Following the appellant, his two employees, namely Kanki @ Vishnu and Guddu Maharaj, who were present there at that time, were also subjected to personal search and from the possession of Kanki 100 grams and from Guddu Maharaj 35 grams smack powder was recovered. Samples were similarly taken from the recoveries made from those two accused also.

4. The samples taken from the smack powder alleged to have been recovered from the three accused, including the appellant were sent to Forensic Science Laboratory vide draft, Exhibit

P.31. The FSL report, Exhibit P.32 confirmed that the samples contained diacetylmorphine (heroin). On completion of investigation, charge-sheet was submitted against all the three accused, including the appellant on 31.3.2005. Charges were framed against the accused and they were put on trial. The trial court by judgment and order dated 9.11.2005 passed in Special Case No.4/2005 held all the three accused, including the appellant guilty of offences punishable under Sections 8/21(b) of the NDPS Act and sentenced them as noted above.

5. Against the judgment of the trial court, the appellant preferred Criminal Appeal No.2511/2005 before the High Court. Another appeal being Criminal Appeal no.86 of 2006 was filed by Guddu Maharaj. There is, however, no indication that the third accused Kanaki took the matter in appeal. The High Court dismissed both the appeals by judgment and order dated April 17, 2008.

6. The appellant alone has come in appeal against the judgment of the High Court.

7. On hearing Mr. Akshat Shrivastava, learned counsel for the appellant and Ms. Vibha Datta Makhija, learned counsel for the State and on going through the materials on record, we find there are several features in this case that make it very difficult for us to sustain the conviction of the appellant.

8. To begin with, there were two independent witnesses of the seizure, namely, Ajay Purohit and Udaipal Singh whose signatures were taken on the seizure memos, Exhibits P.22 to 24. They were examined before the Court as PWs 8 and 9 respectively. Neither of the two supported the case of the prosecution. PW.8 was, as a matter of fact, quite emphatic in his denial of any recovery having been made from the appellant or the other accused in his presence. Both were declared hostile by the prosecution. Both the trial court and the High Court had, therefore, to rely upon the testimony of R. K. Jharkhandia, PW 10 who was the Station House Officer at the material time and who had conducted the raid to accept the prosecution case of recovery of the suspected narcotic from the accused.

9. The seizure witnesses turning hostile may not be very significant, as it is not an uncommon phenomenon in criminal trials, particularly in cases relating to NDPS but there are some other circumstances which, when taken together, make it very unsafe to uphold the appellant's conviction.

10. The seizure of the alleged narcotic substance is shown to have been made on March 8, 2005, at 11:45 in the evening. The samples taken from the seized substance were sent to FSL on March 10, 2005, along with the draft, Exhibit P.31. The samples sent for forensic examination were, however, not deposited at the FSL on that date but those came back to the police station on March 12, 2005 due to some mistake in the draft or with some query in respect of the draft. The samples were sent back to the FSL on March 14, 2005, after necessary corrections in the draft and/or giving reply to the query and on that date the samples were accepted at the FSL. From the time of the seizure in the late evening of March 8, 2005, till their deposit in the FSL on March 14, 2005, it is not clear where the samples were laid or were handled by how many people and in what ways.

11. The FSL report came on March 21, 2005, and on that basis the police submitted charge-sheet against the accused on March 31, 2005, but the alleged narcotic substance that was seized from the accused, including the appellant was deposited in the Malkhana about two months later on May 28, 2005. There is no explanation where the seized substance was kept in the meanwhile.

12. Last but not the least, the alleged narcotic powder seized from the possession of the accused, including the appellant was never produced before the trial court as a material exhibit and once again there is no explanation for its non-production. There is, thus, no evidence to connect the forensic report with the substance that was seized from the possession of the appellant or the other accused.

13. It may be noted here that in *Jitendera and another v. State of M.P.*[1], on similar facts this Court held that the material placed on record by the prosecution did not bring home the charge against the accused beyond reasonable doubt and it would be unsafe to maintain their conviction on that basis. In Jitendra (supra), the Court observed and held as under:-

> "The evidence to prove that charas and ganja were recovered from the possession of the 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 (PW 7), Angad Singh (PW 8) and Sub-Inspector D.J. Rai (PW 6), there is no independent witness as to the recovery of the drugs from the possession of the 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 them with the samples sent to the Forensic Science Laboratory. There is no material produced in the trial, apart from the interested testimony of the 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 CrPC to hold that non-production of the material object was a mere procedural irregularity and did not cause prejudice to the accused.
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> 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 panchnama 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 panchnama is nothing but a document written by the police officer concerned. The suggestion made by the defence in the cross-examination is worthy of notice. It was suggested to the prosecution witnesses that the landlady of the house in collusion with the 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 panch 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."

14. The decision in Jitendra (supra) applies to the facts of this case with full force.

15. We, accordingly, hold that the appellant is entitled to the benefit of doubt and acquit him of the charges and set aside the judgments and orders passed by the trial court and the High Court.

16. At this stage, it may be noted that though the other two accused, namely, Kanki @ Vishnu and Guddu Maharaj are not before us, we see no reason why the benefit of this judgment may not be extended to them as well. From the possession of Kanki @ Vishnu, the recovered quantity was 100 grams and from Guddu Maharaj 35 grams. All the three accused including the appellant were tried together and the other two accused Kanki @ Vishnu and Guddu Maharaj have also been given the same sentence as the appellant. The lapses in the prosecution and the facts and circumstances that have been noted above and that have weighed with us for setting aside the conviction of the appellant apply equally to the case of Kanki @ Vishnu and Guddu Maharaj. It will be unjust, therefore, to let them rot in jail even while allowing the appeal preferred by the appellant. (See: *Raja Ram and others v. State of M.P*[2]*., Dandu Lakshmi Reddy v.State of A.P*[3]*., State of Haryana and others v. Sumitra Devi and others*[4]*, Mangoo v. State of M.P.*[5]*, Bachan Singh v. State of Bihar*[6]*,* We, accordingly, direct that their conviction and sentence be also set aside and they too along with the appellant be released forthwith unless anyone of them is required in connection with any other case.

17. The appeal is, accordingly, allowed.

Judgment Referred.

[1]*(2004) 10 SCC 0562*
[2]*(1994) 2 SCC 0568*
[3]*(1999) 7 SCC 0069*
[4]*(2004) 12 SCC 0322*
[5]*(2008) 8 SCC 0283*

[6](2008) 12 SCC 0023