

OM PRAKASH @ BABA
v.
STATE OF RAJASTHAN
(Criminal Appeal No. 575 of 2009)

AUGUST 25, 2009

[HARJIT SINGH BEDI AND AFTAB ALAM, JJ.]

Narcotic Drugs and Psychotropic Substances Act, 1985 – Recovery of huge quantity of charas, opium and ganja from a house stated to be in possession of accused – Conviction by trial court – Affirmed by High Court – Held: A bare perusal of the evidence would reveal that the ownership and possession of the house and the place of recovery is uncertain – As a matter of fact PW-3 has categorically stated that the house from where the recovery had been made belonged to a different person and not to the accused – Even assuming that the house did belong to the accused and was in his possession, the prosecution was further required to show that the accused had exclusive possession of the contraband, as a very large number of persons including the accused and five of his brothers, their children and their parents were living therein – There is no evidence on record to prove accused's ownership and exclusive possession of the premises and the contraband in question – Judgments of courts below set aside – Accused acquitted – Evidence.

Mohd. Alam Khan vs. Narcotic Control Bureau and another AIR (1996) SC 3033, relied on

Case Law Reference:

AIR (1996) SC 3033 relied on para 5

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal
No. 575 of 2009.

A From the Judgment & Order dated 21.8.2006 of the High Court of Judicature at Rajasthan at Jaipur Bench in Criminal Appeal No. 640 of 2001.

B K.S. Bhati, Aishwarya Bhati, Sweta Rani, Rekha Giri and Himanshu Singh for the Appellants.

Dr. Manish Singhvi and Milind Kumar for the Respondent.

The following Order of the Court was delivered by

C O R D E R

The appellant was convicted under Sections 8/18, 8/20(B)(ii) and 8/20(B)(i) of the Narcotic Drugs Psychotropic Substances Act and sentenced to 10 years R.I. and fine of Rs.1,00,000/- and in default thereof to undergo R.I. For two years. He is before us by way of special leave.

The prosecution story is as under:

E On 11th September, 1999 at about 7.00 a.m., PW.11 Ram Chander, SHO, Kotwali Fatehpur and several other police officials raided the house allegedly belonging to the appellant to arrest Pankaj his son in some criminal matter, and as they approached his residence, they saw the appellant who was present attempting to run away. He was however apprehended and the house entered and searched and a huge quantity of F Charas, opium and Gaanja were recovered from under a mattress in a newly constructed room. The S.H.O. sent information to the Superintendent of police, Seekar and completed the other formalities relating to the search & seizure. Several independent witnesses were also called to G countersign the search memos. The contraband recovered was sent to the Malkhana and thereafter for analysis to the Laboratory and a report was duly received. On completion of the investigation the appellant was charged for the offences above-mentioned and as he pleaded innocence, he was H brought to trial.

The prosecution in support of its case examined 14 witnesses in all; the primary ones being PW.3 and 13, said to be independent witnesses to the search and seizure, PW.12 an Engineer from the Department of Telecommunication and PW.14 from the Electricity Department to identify the house as belonging to the appellant, and the investigating officer, PW.11 Ram Chander. The trial Court recorded a finding that the ownership and possession of the contraband in question had been proved beyond doubt, in the light of the fact that the witnesses had deposed that the recovery had been made from the house belonging to and in possession of the appellant and that the samples of the contraband had been properly sealed and kept in proper custody and having held as above, convicted and sentenced the appellant. An appeal taken to the High Court by the appellant did not succeed. The matter is now before us by special leave.

At the very outset Mr. Bhatti, the learned counsel for the appellant, has pointed out that the appellant had been arrested on 11th September, 1999 and as he had not been bailed out at any stage, he had almost completed the period of his sentence but as a fine of Rs.1,00,000/- had also been imposed the matter was still alive and required consideration. He has accordingly submitted that the main issue that would arise in this Court would be as to whether the contraband was in possession of the appellant, and if a doubt could be created on this important aspect, the prosecution story must fail. He has further pointed out that the trial Court as well as the High Court were conscious of this difficulty and had bye-passed the evidence in an unacceptable manner apparently for the reason that the recovery pertained to a huge quantity of contraband material. He has also relied on *Mohd. Alam Khan vs. Narcotic Control bureau and another* AIR (1996) SC 3033 to contend that the finding on the question of possession and ownership was a sine qua non before an accused could be convicted in the case of a recovery made from a house which was occupied by several persons other than the accused.

A Mr. Manish Singhvi, the learned counsel for the respondent-state has, however, supported the judgment of the courts below and has further pointed out that the site plan and the evidence of PW.3 when appraised together led to the conclusion, that the house from which the contraband had been seized was not only
 B in the possession of the appellant but also in his ownership and as the police party had been looking for the appellant's son Pankaj a presumption could safely be drawn that the house did belong to him.

C We have considered the arguments advanced by the learned counsel very carefully. We first go to the evidence of PW.3, the primary witness, with regard to the ownership and possession of the property. This witness claimed to have been present when the contraband had been recovered. He, however, very categorically stated that the appellant did not
 D reside at the house in question as it was in possession of one Durga Bhanji and that she did not have any association with the appellant. He reiterated the same observation later in his evidence and then further testified that the appellant's house was infact some distance away from the house of Durga Bhanji.
 E Going still further he deposed that appellant's brothers five in all, their children and parents all lived in the same house. It is also clear that despite this statement which goes completely against the prosecution story, PW.3 was not declared hostile. The prosecution has also relied on the evidence of PW.12 Shiv
 F Baksh who was a Sub-Divisional Engineer in the Telecom Department posted in Seekar to show that telephone number 20591 had been installed in the house belonging to the appellant. In the cross-examination, however, he stated that he was unaware of the exact location of the house where the
 G telephone had been installed and that he had not made a physical verification before the installation and he was unaware of the location of the house and was not in a position to identify even the neighbourhood. The prosecution has further relied on the evidence of PW.14 Rajendra, an Assistant Engineer with
 H the Electricity Department to prove the installation of the

Electricity connection in the house. In his cross-examination this witness deposed that though he had made some checks as to the location of the house he had done so without inspecting the house and only on the basis of the record. In addition to this the prosecution has relied upon several witnesses including PW.13 Rajesh to prove the place of recovery. These statements are also unclear and do not advance the prosecution case more particularly as Rajesh was declared hostile as he did not support the prosecution.

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A bare perusal of the evidence aforementioned would reveal that the ownership and possession of the house and the place of recovery is uncertain. As a matter of fact PW.3 has categorically stated that the house from where the recovery had been made belonged to one Durga Bhanji and not to the appellant. Even assuming for a moment that the house did belong to the appellant and was in his possession, the prosecution was further required to show the appellant had exclusive possession of the contraband as a very large number of persons including the appellant and five of his brothers, their children and their parents were living therein. Admittedly, there is no evidence as to the appellants exclusive possession. In this situation we find that the judgment cited by the learned counsel that is Mohd. A.Khan's case fully supports the plea on behalf of the appellant, we observe that in addition to the ocular evidence, the prosecution had also put on record a document pertaining to the ownership of the house, but despite this, the Court held as under:

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"The prosecution did not bother to produce any independent evidence to establish that the appellant was the owner of the flat in question by producing documents from concerned Registrar's office or by examining the neighbours. No statement has been made by the prosecution that in spite of the efforts taken by them, they could not produce the document or examine the neighbours to prove the ownership of the appellant relating

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A to the flat in question. It is relevant to note here that two independent witnesses attested the panchnama. Only one of them was examined as P.W.5 who did not support the prosecution version and therefore was treated as hostile. In this case except the retracted statements of the
B appellant to connect the appellant with the house in question, no other independent evidence is available to sustain the finding of the learned Special Judge extracted in the beginning and confirmed by the High Court."

C To our mind the afore-quoted observations clearly support Mr. Bhatti's argument. We find that there is no evidence on record to prove the appellant's ownership and possession of the premises and the contraband in question.

D The appeal is accordingly allowed, the judgments of the Courts below are set aside and the appellant acquitted. He is said to be in custody. He is directed to be released forthwith.

R.P.

Appeal allowed.