VIJAY JAIN

v.

STATE OF MADHYA PRADESH

(Criminal Appeal No. 486 of 2013 etc.)

JUNE 20, 2013

[A.K. PATNAIK AND RANJAN GOGOI, JJ.]

Narcotic Drugs and Psychotropic Substances Act, 1985:

s.8/21 (c) – Conviction on the ground of seizure of contraband goods from accused – Non production of contraband goods before court – Effect of – Held: As the prosecution has not produced before court, the brown sugar alleged to have been seized from appellants and has also not offered any explanation therefor and as the evidence of witnesses to seizure does not establish seizure of brown sugar from appellants, judgment of trial court convicting the appellants and that of High Court maintaining the conviction are not sustainable and, as such, are set aside.

The appellants were convicted u/s 8/21(c) of the Narcotic Drugs and Psychotropic Substances Act, 1985 and sentenced to 10 years RI with a fine of Rs. 1 lakh each. The trial court and the High Court accepted the prosecution case that on a raid conducted by PW-11, the Thanedar Incharge (TI) of the police station, the appellant in Crl. A. No. 484 of 2013 was apprehended outside a flat with a suit case containing brown sugar and the other appellant was apprehended, inside the said flat, with brown sugar. The brown sugar from the appellants was stated to have been seized.

In the instant appeals, it was mainly contended that the conviction of the appellants could not be sustained for non-production before the trial court of the contraband

A goods alleged to have been seized from them and the finding of the trial court that the contraband goods were produced in court was perverse.

Allowing the appeals, the Court

B HELD: 1.1. The finding of the trial court that the seized contraband goods were produced in a suitcase is contrary to the evidence of P.W. 11 (the TI). There is no mention in the evidence of P.W. 11 of any brown sugar having been found in the suit case. The only C evidence before the court was that in the suit case in which the contraband goods were kept, when opened, there was only a big packet wrapped in cloth which contained clothes in a blue coloured polythene. There is, however, evidence that samples were prepared of D 25.25gms which were shown to the witnesses and were marked B1 B2, but P.W. 3 (the witness of seizure) has stated before the court that these samples were not prepared in his presence and P.W. 2 (the other witness of seizure) has stated before the court that the witnesses E were not taken to the site where the materials were seized. [para 11] [300-F-G; 301-G-H; 302-A-B]

1.2. As the prosecution has not produced before the court, the brown sugar alleged to have been seized from the appellants and has also not offered any explanation F therefor and as the evidence of the witnesses (PW 2 and PW3) to the seizure of the materials does not establish the seizure of brown sugar from the possession of the appellants, the judgment of the trial court convicting the appellants and that of the High Court maintaining the G conviction are not sustainable and, as such, are set aside. [para 12] [302-C-D]

Jitendra & Anr v. State of M.P. 2003 (3) Suppl. SCR 918 = (2004) 10 SCC 562; *Ashok v. State of M.P.* 2011 H (4) SCR 253 = (2011) 5 SCC 123 – relied on.

Noor Aga v. State of Punjab and Another **2008 (10) SCR 379 = (2008) 16 SCC 417 – referred to.** A

Case Law Reference:

2003 (3) Suppl. SCR 918	**relied on**	**para 4**
2011 (4) SCR 253	**relied on**	**para 4**
2008 (10) SCR 379	**referred to**	**para 8**

B

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 486 of 2013. C

From the Judgment & Order dated 21.02.2011 of the High Court of Madhya Pradesh, Bench at Indore in Criminal Appeal No. 1048 of 2007.

WITH D

Crl. A. No. 484 of 2013

Sushil Kumar Jain, Puneet Jain, Pratibha Jain for the Appellant.

Ayesha Choudhary, Musharraf Choudhary, C.D. Singh for the Respondent. E

The following Order of the Court was delivered

ORDER F

1. These are appeals by way of special leave under Article 136 of the Constitution of India against the judgment and order dated 21st February, 2011 of the Madhya Pradesh High Court, Indore Bench in Criminal Appeal Nos. 1048 and 1172 of 2007.

2. The facts very briefly are that on 5th May, 2004, R.C. Pathak, Thanedar Incharge (TI) of Police Station Annapura conducted raid at 15:15 hours at Kshitij Apartment, Usha Nagar Square and apprehended Nilesh Suryakant Shah, the appellant in Criminal Appeal No. 484 of 2013 outside Flat No. 305 of the Apartment as he was alleged to have been carrying brown G H

A sugar in a suit case. After seizing the alleged brown sugar from Nilesh, R.C.Pathak entered Flat No.305 and apprehended the appellant Vijay Jain as it was alleged that he also had brown sugar in his clothes. R.C. Pathak also seized the alleged brown sugar from Vijay. Thereafter he handed over investigation to his B successor, R.D.Bhardwaj, Thanedar Incharge of Raj Nagar Police Station and after investigation charge sheet was filed against Nilesh and Vijay for the offence under Section 8/21(c) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short "the NDPS Act").

C

3. The two appellants denied the charges and trial was conducted by the Special Judge(NDPS), Indore. At the trial, the prosecution examined as many as 12 witnesses. Shirish Babu Tiwari and Manoj Dubey who witnessed the seizure were examined as P.Ws 2 and 3. R.C. Pathak was examined as D P.W. 11 and Lokendra Singh Yadav who was in charge of the Malkhana in which the brown sugar was said to have been stored was examined as P.W. 5. The learned Special Judge (NDPS), Indore by judgment dated 17th August, 2007, convicted the appellants and sentenced them both for 10 years E rigorous imprisonment and imposed a fine of '1 lakh on each. Aggrieved, the appellants filed Criminal Appeal Nos. 1048 and 1172 of 2007 before the High Court, but by the impugned common judgment, the High Court maintained the conviction and sentence and dismissed the appeals. Aggrieved the F appellants have filed these appeals.

4. Mr. Sushil Kumar Jain, learned counsel appearing for the appellants raised several contentions to assail the conviction of both the appellants. For deciding these appeals, G we will consider only the contention of Mr. Jain that the contraband goods have not been produced before the trial court. He submitted that this Court has held in *Jitendra & Anr. v. State of M.P.* (2004) 10 SCC 562 that where there is non-production of the contraband goods alleged to have been seized from the accused, the conviction for the offence under H

Section 20(b) of the NDPS Act cannot be sustained. He also cited the decision of this Court in *Ashok v. State of M.P.* (2011) 5 SCC 123 in which a similar view has been taken that where the narcotic drug or the psychotropic substance alleged to have been seized from the possession of the accused is not produced before the trial court as a material exhibit and there is no explanation for its non-production, there is no evidence to connect the forensic expert report with the drug or the substance that was seized from the possession of the accused and in such a case the conviction is not maintainable.

5. Mr. Jain further submitted that although the contention that the contraband goods were not produced before the Court was raised, the trial court recorded a finding that on 24th February, 2005, the seized materials were deposited in Court and this finding was arrived at by referring to item no. 4 in the order sheet of the Court dated 24th February, 2005. He submitted that the trial court has held that a suitcase had been produced before the Court and the seized articles were kept in the suit case. He submitted that the evidence of P.W. 11 on the contrary is that a big suit case from the store of materials was produced before the trial court and when the lock of the suit case was broken and the suit case was opened, a big packet wrapped in cloth was found and a blue coloured polythene was seen in which clothes were there. He submitted that the finding of the trial court, therefore, that the contraband goods were produced in Court was perverse as there was no evidence whatsoever to support the said finding. He argued that though a submission was made also before the High Court on behalf of the appellants that the contraband was not produced in Court, the High Court brushed aside the submission by recording a bald finding that the contraband has been produced before the Court without delay. He submitted that the finding of the High Court that the contraband has been produced in Court is, therefore, contrary to the evidence recorded.

6. Mr. Jain submitted that the prosecution had also taken

A a stand in the alternative before the trial court that the contraband goods were destroyed and, produced before the trial court only the samples of the contraband goods. He referred to the provisions of Section 52A of the NDPS Act to submit that in a case of destruction of contraband goods the procedure B as laid down in sub-section (2) of Section 52A of the Act has to be followed and in case of destruction, the inventory prepared at the time before destruction and the photographs of the narcotic drugs and psychotropic substances and the list of samples drawn under sub-section (2) of Section 52A of the C Act as certified by the Magistrate are treated as primary evidence in respect of the offence. He vehemently argued that since no such procedure has been followed, the alternative plea taken by the prosecution that the contraband goods have been destroyed and could not be produced before the Court cannot D be accepted.

7. Mr. Jain also submitted that P.W.3 in his evidence before the Court, has admitted that the police personnel did not take search of any one in front of him and there was no action in front of him regarding seizure of the brown sugar from any E person nor any action was done regarding preparation of samples and sealing nor was any action taken in front of him with regard to affixing chits and seizing the materials nor with regard to arrest of any person. He submitted that P.W.3 also stated in his evidence that his signatures were only taken on F 'A' to 'A' part of Exhibit P.5 to P.6 and 'B' to 'B' part of Exhibit P.3 and P.4 and from 'A' to 'A' part of Exhibit P7 to 26 in the Panchnama. He vehemently argued that prosecution has thus not been able to prove through P.W.3 that the contraband goods were actually seized from the possession of the appellants. He G pointed out that P.W. 3 in fact has been declared hostile. He submitted that similarly P.W. 2 has stated in his evidence that no panch was taken to the site and that would show that the signatures were taken in the Panchnama by the police without taking the seizure witnesses to the place where the materials H were alleged to have been seized from the possession of the

appellants. He submitted that the facts in this case, therefore, are similar to the case in *Jitendra* (supra) in which this Court found that the panch witnesses had turned hostile and held that in the absence of non-production of the seized drugs the conviction under the NDPS Act was not maintainable.

8. Ms. Ayesha Choudhary learned counsel appearing for the State of Madhya Pradesh, on the other hand, relied on the judgments of the trial court as well as the High Court for the findings recorded therein that the contraband goods were produced before the Court. In the alternative, she submitted that it has been held by this Court in *Noor Aga v. State of Punjab and Another* (2008) 16 SCC 417 that even if it is accepted for the sake of arguments that the bulk quantity of heroin was destroyed, the samples were essentially to be produced and proved as primary evidence for the purpose of establishing the fact of recovery of heroin as envisaged under Section 52A of the NDPS Act. She submitted that since the samples of the contraband goods in this case which were seized from the two appellants were produced and marked as Exhibits A1, A2 and B1,B2, the prosecution has been able to establish the fact of recovery of the contraband goods from the two appellants.

9. Paragraph 96 of the judgment of this Court in *Noor Aga's* case (supra) on which learned counsel for the State very strongly relies is quoted herein below:-

> "Last but not the least, physical evidence relating to three samples taken from the bulk amount of heroin was also not produced. Even if it is accepted for the sake of argument that the bulk quantity was destroyed, the samples were essential to be produced and proved as primary evidence for the purpose of establishing the fact of recovery of heroin as envisaged under Section 52-A of the Act."

Thus, in paragraph 96 of the judgment in *Noor Aga's* case, this Court has held that the prosecution must in any case

A produce the samples even where the bulk quantity is said to have been destroyed. The observations of this Court in the aforesaid paragraph of the judgment do not say anything about the consequence of non-production of the contraband goods before the Court in a prosecution under the NDPS Act.

B

10. On the other hand, on a reading of this Court's judgment in *Jitendra's case* (supra), we find that this Court has taken a view that in the trial for an offence under the NDPS Act, it was necessary for the prosecution to establish by cogent evidence that the alleged quantities of the contraband goods C were seized from the possession of the accused and the best evidence to prove this fact is to produce during the trial, the seized materials as material objects and where the contraband materials alleged to have been seized are not produced and there is no explanation for the failure to produce the contraband D materials by the prosecution, mere oral evidence that the materials were seized from the accused would not be sufficient to make out an offence under the NDPS Act particularly when the panch witnesses have turned hostile. Again, in *the case of Ashok* (supra), this Court found that the alleged narcotic powder E seized from the possession of the accused was not produced before the trial court as material exhibit and there was no explanation for its non-production and this Court held that there was therefore no evidence to connect the forensic report with the substance that was seized from the possession of the F appellant.

11. In the present case, finding of the trial court that the seized contraband goods were produced in a suitcase is contrary to the evidence of P.W. 11, which is to the following G effect:-

> "81. Note – A big suit case from the Store materials on which No. 466/05 is written has been received in a white cloth along with seal of the sealing material. In this the lock is of Nos. and the lock is not getting open because of this H A.G.P. is directed to call some technical person for

opening the lock, on this A.G.P. Had called Shri Shakoor who expressed that the lock of Nos. and cannot be opened, it can be broken. In the case, the evidence material is important and therefore it was directed to break the lock, the lock was opened. In the suit case on the opening a big packet wrapped in cloth was found but the cloth in torn and blue coloru polythene is being seen in which clothes are there. The cloth which is rolled on blue colour of polythene there is no seal visible on it, nor any description is being seen, because the cloth is damp and has been in contaminated condition and is torn and no note is marked on it. In the polythere there are 5 pants and 5 shirts which are in wet condition.

X X X X X X X X X X

111. Today I cannot say that in what colour bag the rest of the substance was packed in the bag. The material which was seized from Vijay Jain out of it two samples 25-25 gms. were made and marked B1 and B2 which were shown to the witness when he said that they were taken out from the material found with Vijay Jain on site. No other packet except the two samples and rest of material were made on the site. The said both the packets which have been submitted in the court are sealed and on them the seizure chit is not affixed showed the B1 B2 packet and asked that the seal of Police Station is affixed then the witness said the seal of Police Station is affixed then the witness said that it is the seal of Tehsildar Indore. Leaving aside rest of the substance and mobile the other seized material from Vijay is submitted in the Court. This is true that I had not given the mobile for sealing to the Incharge of Stores. Today I cannot say that where that mobile is."

Thus the only evidence before the Court was that in the suitcase in which the contraband goods were allegedly kept when opened, there was only a big packet wrapped in cloth and the cloth was torn and there was a blue coloured polythene in

A which there were clothes. There is no mention in the evidence of P.W. 11 of any brown sugar having been found in the suit case. There is, however, evidence that samples were prepared of 25.25gms which were shown to the witnesses and were marked B1 B2 but we find that P.W. 3 has stated before the B Court in his examination that these samples were not prepared in his presence and P.W. 2 has stated before the Court that the witnesses were not taken to the site where the materials were seized.

12. We are thus of the view that as the prosecution has C not produced the brown sugar before the Court and has also not offered any explanation for non-production of the brown sugar alleged to have been seized from the appellants and as the evidence of the witnesses (PW 2 and PW3) to the seizure of the materials does not establish the seizure of the brown D sugar from the possession of the appellants, the judgment of the trial court convicting the appellants and the judgment of the High Court maintaining the conviction are not sustainable.

13. In the result, we allow these appeals and set aside the E impugned judgment of the trial court as well as the High Court. The appellants are stated to be in jail. They shall be released forthwith if not required in connection with any other case.

R.P. Appeals allowed.