A STATE OF HARYANA

v.

ASHA DEVI AND ANR.

(Criminal Appeal No.1953 of 2009)

B MAY 12, 2015

[PINAKI CHANDRA GHOSE AND UDAY UMESH LALIT, JJ.]

C *Narcotic Drugs and Psycotropic Substances Act, 1985 – s. 20 – Appeal against acquittal – On facts, search and seizure of 11 kgs of intoxicated drug-ganja from the wife and her husband – Wife apprehended, however, her husband managed to escape – Trial court finding the prosecution* D *evidence inconsistent and untrustworthy and that the prosecution failed to prove its charges beyond reasonable doubts, acquitted them of the charges – High Court upheld the said order – On appeal, held: Assessment of evidence and consideration of the matter by both the courts as regards* E *no independent witness; husband could not have fled in presence of five police officers; and the link evidence of the possession of seal 'RP' transferring from ASI to IO is not proved, is erroneous and cannot be termed as a possible view – Prosecution sufficiently proved its case to establish* F *the guilt of the accused – Thus, the wife and her husband convicted u/s. 20 and sentenced to simple imprisonment for five years.*

Allowing the appeal, the Court

G **HELD: 1.1 The High Court and the trial court relied on three points to decide the matter against the State- no independent witness; husband could not have fled in presence of five police officers; and the link evidence** H **of the possession of seal "RP" transferring from ASI to**

I.O. is not proved. The assessment of evidence and consideration of the matter as regards these points by both the courts is erroneous and cannot be termed as a possible view. [Para 7] [355-B-D] A

1.2 Both the DSP as well as I.O. have deposed that public persons were available when the contraband was seized; however, none of the public person acceded to their request of joining the investigation as an independent witness. The courts below found it unbelievable but no reason for same was rendered. The consistent statement of both the DSP as well as I.O. rather enhances the veracity of the circumstances as put forth by them. With respect to the finding of the courts below that husband could not have fled away after scaling the wall and the police constables would have failed to catch hold of him; the courts below proceeded on assumption and conjecture. There is nothing in the evidence which could show that husband could not have run away. There are positive statements by several prosecution witnesses that he ran away on seeing the police party and these statements have withstood the test of cross examination as well. So, the High Court and the trial court were not correct in arriving at the said finding. [Para 8] [355-E-H; 356-A] B C D E F

1.3 The courts below found the prosecution case as doubtful inasmuch as that when the seal "RP" was in possession of ASI, how could it have been with I.O. the next day. The more important evidence was with respect to the sample which was sealed with "RP". There is clear evidence that initially the samples were taken and sealed with "RP" and "MS" at the place of seizure and thereafter, on same day, SHO also sealed the said samples with "SS". There is uncontroverted evidence to the fact that the samples were produced before the Judicial G H

A Magistrate, where seal of one sample was broken and resealed with "RP". Thereafter, the sample was deposited in Judicial Malkhana from where it was sent to the FSL. The FSL report notes that the seal was intact and the sample was un-tampered. All the persons who B possessed the contraband sample have been brought on record to support that no tampering was done with the samples. The defence failed to bring out anything in the cross-examination of the witnesses with respect to tampering of the samples. Thus, it is found that the C samples were properly dealt with throughout and the same was found to be Ganja. With respect to the seal that was handed over to ASI, the defence failed to cross-examine the I.O. as to how did he got possession of seal back from ASI. Under these circumstances, the D prosecution was not duty bound to explain the movement of the seal from one person to another in the given circumstances. Since, the movement of sample has been proved and found to be regular, the prosecution E has sufficiently proved its case to establish the guilt of the accused. [Para 9, 10] [356-C-H;357-A-B]

1.4 The commercial quantity of Ganja is 20 Kgs. or more, and the accused are in possession of small F quantity as per the Notification of the Central Government providing small and commercial quantities of various contrabands. After giving due weight to the mitigating as well as the aggravating circumstances, the accused persons are convicted under Section 20 of the G Narcotic Drugs and Psycotropic Substances Act, 1985 for possession of 11 kgs. Ganja and sentence them to simple imprisonment for five years. Thus, the order passed by the High Court as also by the trial court is set aside. [Para 12, 14] [360-A-C& F]

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Allauddin Mian & Ors. Vs. State of Bihar **(1989) 3 SCC – referred to.** A

Case Law Reference

(1989) 3 SCC	**Referred to.**	**Para 11**

B

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1953 of 2009

From the Judgment and Order dated 10.12.2007 of the High Court of Punjab and Haryana at Chandigarh in C Criminal Misc. No. 560-MA of 2007

Rakesh K. Mudgal, AAG, Dinesh Mudgal, Sanjay Kumar Visen for the Appellant.

Ravi Kumar Tomar, Dinesh S. Badiar for the D Respondents.

The Judgment of the Court was delivered by

PINAKI CHANDRA GHOSE, J. - 1. This appeal has E been filed by the State of Haryana against the judgment and order dated 10.12.2007 of the High Court of Punjab and Haryana at Chandigarh in Criminal Misc. No.560-MA of 2007, whereby the High Court has declined to grant leave to the State to appeal against the acquittal of the respondents. F

2. The facts of this case, as per the prosecution story, are that on 3.2.2006, when Sub Inspector Ram Phal, ASI Rishi Raj, Constable Surender Singh, Lady Constables Babita Rani and Promila, were on patrol duty in a police G vehicle which was being driven by Constable Darshan Singh, near Chimni Bai Dharamshala, NIT No.3, SI Ram Phal received a secret information that Om Prakash son of Moti Lal, and his wife Asha Devi, residents of Gali No.1, Jhuggi Kalyanpuri, bring Ganja (intoxicated drug) from Madhya H

A Pradesh and supply in Faridabad and if a raid is conducted at their house, Ganja in heavy quantity would be recovered. On receiving this information, the aforesaid police team raided the house of Om Prakash. On seeing the police party, Om Prakash managed to escape by scaling over the wall of
B the house. Asha Devi also tried to escape but she was apprehended with the help of Lady Constables. On query she disclosed her name as Asha wife of Om Prakash and also disclosed that the man who had escaped from the house was Om Prakash. A notice in writing under Section 50 of the
C Narcotic Drugs and Psychotropic Substances Act, 1985 ("NDPS Act", for short) was served on her informing her of the right to either allow the Sub Inspector to take search of her house or opt for the search in presence of some Gazetted
D Officer or a Magistrate. Asha Devi consented for search of her house in the presence of some Gazetted Officer. Accordingly, Shri Maharaj Singh, the then Deputy Superintendent of Police, NIT, Faridabad, reached the spot and in his presence the house of Asha Devi was searched.
E Asha Devi unpacked a box, took out a bag containing Ganja and produced it before the Sub Inspector. The bag was weighed and found to be contained 11 Kgs. of Ganja out of which two samples of 200 gms. each were taken and sealed with letters "RP" and "MS" on the seal. Both the samples
F along with the residue and the specimen seal impressions were taken into possession by the police under the recovery memo which was prepared by I.O. Ramphal and witnessed by ASI Tej Ram and ASI Rishiraj and attested by DSP Maharaj Singh and thumb mark of Asha Devi. The case
G property along with the samples and the witnesses were produced before the Station House Officer, who after verifying the facts affixed his seal thereon and were deposited in the Moharrer Police Malkhana. A case was registered against accused Asha Devi under Section 20(61) of the NDPS Act
H and she was arrested. Thereafter, on 04.02.2006 case

property and both samples were produced before the learned Judicial Magistrate, 1st Class, Faridabad. The learned judicial Magistrate broke the seals on the case property as well one of the samples. The learned Judicial Magistrate verified the material, photographs were taken and contraband was weighed; thereafter the sample was resealed with the seal of RP. The Judicial Magistrate directed the Investigation Officer to deposit the material to Judicial Malkhana. After investigation, accused Asha Devi was charged under Section 20 of the NDPS Act and accused Om Prakash was charged under Sections 28 & 29 of the NDPS Act. The accused pleaded not guilty and hence the case was committed for trial.

3. The Trial Court examined ten prosecution witnesses and two defence witnesses. After going through the prosecution evidence and after hearing the learned counsel for the parties, the Trial Court did not find favour with the prosecution version as according to it, on receiving the secret information, Sub Inspector did not join any independent witness during the investigation of the case despite the fact that they were available at the spot. It further found that the seal "RP" was entrusted to ASI Rishiraj after sealing the case property and samples on 3.2.2006; so, I.O. Ramphal could not have possessed that seal the next day when the case property was produced before the learned judicial magistrate. However, the learned judicial magistrate has testified to the fact that sample was resealed after verification, photograph and weighment with the seal of "RP". The learned Trial Court found it irreconcilable that seal "RP" could have been available with the learned Judicial Magistrate when ASI Rishiraj is not there. Further, the Trial Court found non production of ASI Rishiraj as prosecution witness creates more suspicion. Also, ASI Tej Raj (PW-2) had chased the accused Om Prakash when he was trying to run away but

A he was unable to apprehend him. This part of the story was also not believed by the Trial Court for the reason that five constables were standing outside the house of Om Prakash and it was not possible for Om Prakash to have scaled the wall of the house. The Trial Court found the evidence of the
B prosecution as completely inconsistent and untrustworthy and held that the prosecution has failed to prove its charges against the accused beyond all shadows of reasonable doubt and accordingly, acquitted the accused of the charges levelled against them.
C

4. The State moved an application before the High Court of Punjab and Haryana at Chandigarh, seeking leave to appeal against the order of acquittal passed by the Trial Court. The High Court vide its judgment and order dated
D 10.12.2007, declined to grant leave to the State to appeal against the acquittal of the respondents and dismissed the application filed by the State. The State of Haryana has, thus, impugned the judgment of the High Court before us.

E 5. We have heard the learned counsel appearing for the State of Haryana as also the learned counsel appearing for the accused respondents.

6. The High Court was of the view that the Trial Court
F after going through the prosecution evidence and hearing the learned counsel for the parties, rightly acquitted the accused as it did not find favour with the prosecution version and so far as the search conducted in the presence of the Gazetted Officer is concerned, the same was nothing but a
G casual approach adopted by the Gazetted Officer while effecting the recovery of the contraband (Ganja) and the Investigation Officer did not offer any plausible explanation. ASI Rishi Raj was present with the seal which was used at the time of effecting the recovery, no explanation was offered
H by the prosecution as to how the seal continued to remain in

possession of the ASI Rishi Raj from the date of seizure. The only presumption which the Trial Court drew is that the possibility of sample being tampered with is not ruled out. The High Court was of the view that it is not a fit case where leave to appeal is made out in favour of the State of Haryana and, therefore, declined the same.

7. We find that the High Court and Trial Court both relied on three main points to decide the matter against the State - (i) no independent witness; (ii) Om Prakash could not have fled in presence of five police officers; and (iii) the link evidence of the possession of seal "RP" transferring from ASI Rishiraj to I.O. Ramphal is not proved. The assessment of evidence and consideration of the matter as regards these three points by both the Courts, in our view, is erroneous and cannot be termed as a possible view.

8. We find that both the DSP Maharaj Singh as well as I.O. Ramphal have deposed that public persons were available when the contraband was seized; however, none of the public person acceded to their request of joining the investigation as an independent witness. The Courts below have found it unbelievable but no reason for same is rendered. In our opinion, the consistent statement of both the DSP as well as I.O. rather enhances the veracity of the circumstances as put forth by them. With respect to the finding of the Courts below that Om Prakash could not have fled away after scaling the wall and the police constables would have failed to catch hold of him; we find the Courts below have proceeded on assumption and conjecture. There is nothing in the evidence which could show that Om Prakash could not have run away. There are positive statements by several prosecution witnesses that he ran away on seeing the police party and these statements have withstood the test of cross examination as well. Further, no other evidence was led to disprove the fact of running away of accused Om

A Prakash. So, we are of the view that the High Court and the Trial Court were not correct in arriving at the said finding.

9. There has been a controversy with respect to possession of seal. The controversy is that I.O. Ramphal B had given the seal "RP" to ASI Rishiraj on 03.02.2006 after sealing the contraband and samples thereof. However, the next day when the case property was produced before the learned Judicial Magistrate, after verification it was resealed again with "RP". The Courts below found the case of C prosecution as doubtful inasmuch as that when the seal "RP" was in possession of ASI Rishiraj, how could it have been with I.O. Ramphal the next day. We find, the more important evidence was with respect to the sample which was sealed with "RP". There is clear evidence that initially the samples D were taken and sealed with "RP" and "MS" on 03.02.2006 at the place of seizure and thereafter, on same day, SHO Vikram Singh also sealed the said samples with "SS". There is uncontroverted evidence to the fact that the samples were produced before the learned Judicial Magistrate, where seal E of one sample was broken and resealed with "RP". Thereafter, the sample was deposited in Judicial Malkhana from where it was sent to the FSL. The FSL report notes that the seal was intact and the sample was un-tampered.

F 10. All the persons who possessed the contraband sample have been brought on record to support that no tampering was done with the samples. The Defence failed to bring out anything in the cross-examination of the witnesses with respect to tampering of the samples. Thus, G we find that the samples were properly dealt with throughout and the same was found to be Ganja. Going further, with respect to the seal that was handed over to ASI Rishiraj, the Defence failed to cross-examine the I.O. Ramphal as to how did he got possession of seal back from ASI Rishiraj. Under H these circumstances, we do not believe that the prosecution

was duty bound to explain the movement of the seal from one person to another in the given circumstances. Since, the movement of sample has been proved and found to be regular, the prosecution has sufficiently proved its case to establish the guilt of the accused in the present case.

11. We have noticed the decision of this Court in ***Allauddin Mian & Ors. Vs. State of Bihar,*** (1989) 3 SCC 5. In the said decision, this Court held as under:-

> "10. Even a casual glance at the provisions of the Penal Code will show that the punishments have been carefully graded corresponding with the gravity of offences; in grave wrongs the punishments prescribed are strict whereas for minor offences leniency is shown. Here again there is considerable room for manoeuvre because the choice of the punishment is left to the discretion of the judge with only the outer limits stated. There are only a few cases where a minimum punishment is prescribed. The question then is what procedure does the judge follow for determining the punishment to be imposed in each case to fit the crime? The choice has to be made after following the procedure set out in sub-section (2) of Section 235 of the Code. That sub-section reads as under:
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> > If the accused is convicted, the judge shall, unless he proceeds in accordance with the provisions of Section 360, hear the accused on the question of sentence, and then pass sentence on him according to law.
>
> The requirement of hearing the accused is intended to satisfy the rule of natural justice. It is a fundamental requirement of fair play that the accused who was hitherto concentrating on the prosecution evidence on

A the question of guilt should, on being found guilty, be asked if he has anything to say or any evidence to tender on the question of sentence. This is all the more necessary since the courts are generally required to make the choice from a wide range of discretion in the B matter of sentencing. To assist the court in determining the correct sentence to be imposed the legislature introduced sub-section (2) to Section 235. The said provision therefore satisfies a dual purpose; it satisfies the rule of natural justice by according to the accused C an opportunity of being heard on the question of sentence and at the same time helps the court to choose the sentence to be awarded. Since the provision is intended to give the accused an opportunity to place before the court all the relevant material having a D bearing on the question of sentence there can be no doubt that the provision is salutary and must be strictly followed. It is clearly mandatory and should not be treated as a mere formality. Mr Garg was, therefore, E justified in making a grievance that the trial court actually treated it as a mere formality as is evident from the fact that it recorded the finding of guilt on 31-3-1987, on the same day before the accused could absorb and overcome the shock of conviction they were asked if F they had anything to say on the question of sentence and immediately thereafter the decision imposing the death penalty on the two accused was pronounced. In a case of life or death as stated earlier, the presiding officer must show a high decree of concern for the G statutory right of the accused and should not treat it as a mere formality to be crossed before making the choice of sentence. If the choice is made, as in this case, without giving the accused an effective and real opportunity to place his antecedents, social and H economic background, mitigating and extenuating

circumstances, etc., before the court, the court's decision on the sentence would be vulnerable. We need hardly mention that in many cases a sentencing decision has far more serious consequences on the offender and his family members than in the case of a purely administrative decision; a fortiori, therefore, the principle of fair play must apply with greater vigour in the case of the former than the latter. An administrative decision having civil consequences, if taken without giving a hearing is generally struck down as violative of the rule of natural justice. Likewise a sentencing decision taken without following the requirements of sub-section (2) of Section 235 of the Code in letter and spirit would also meet a similar fate and may have to be replaced by an appropriate order. The sentencing court must approach the question seriously and must endeavour to see that all the relevant facts and circumstances bearing on the question of sentence are brought on record. Only after giving due weight to the mitigating as well as the aggravating circumstances placed before it, it must pronounce the sentence. We think as a general rule the trial courts should after recording the conviction adjourn the matter to a future date and call upon both the prosecution as well as the defence to place the relevant material bearing on the question of sentence before it and thereafter pronounce the sentence to be imposed on the offender. In the present case, as pointed out earlier, we are afraid that the learned trial Judge did not attach sufficient importance to the mandatory requirement of sub-section (2) of Section 235 of the Code. The High Court also had before it only the scanty material placed before the learned Sessions Judge when it confirmed the death penalty."

A 12. Thus, we find the accused respondents guilty under Section 20 of NDPS Act for possession of 11 Kgs. Ganja. The commercial quantity of Ganja is 20 Kgs. or more, and the accused are in possession of small quantity as per the Notification of the Central Government providing small B and commercial quantities of various contrabands. In view of this, we convict the accused persons (Asha Devi and her husband Om Prakash) under Section 20 of the NDPS Act and sentence them to simple imprisonment for five years.

C 13. Before sentencing, following the principle laid down in Allauddin Mian (supra), this matter was adjourned, giving a chance to the respondents/accused to place facts before us and further directed the appellant to find out about the conduct of the respondents after this incident and to D inform this Court. On the adjourned date, the learned counsel for the appellant and learned counsel for the respondents/ accused expressed that the respondents thereafter were not found to be implicated in any other matter. After hearing the learned counsel for the parties and after giving due weight E to the mitigating as well as the aggravating circumstances placed before us, we think that it would be proper for us to convict the accused persons with the sentence passed by us, which would serve the purpose.

F 14. Accordingly, we set aside the judgment and order passed by the High Court as also by the Trial Court and direct that the accused/respondents shall be taken into custody forthwith to undergo the sentence. The appeal is accordingly allowed.

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Nidhi Jain Appeal allowed.