CRA-1134-1997

(HARISH Vs ***THE STATE OF MP)***

03-04-2017

HIGH COURT OF MADHYA PRADESH: BENCH AT INDORE

SINGLE BENCH:HON'BLE SHRI JUSTICE ALOK VERMA

Criminal Appeal No.1134/1997

Harish s/o Ram Bharose Bhawasar

Vs.

State of Madhya Pradesh

Shri Z.A. Khan, learned Senior counsel with Shri Ramesh Gangare, learned counsel for the appellant.
Ms. Mamta Shandilya, learned counsel for the respondent/State.

JUDGMENT

(Delivered on 03/04/2017)

This criminal appeal arises out of judgment of conviction passed by Special Judge under NDPS Act, 1985 (for short the 'Act') District Mandsaur in Special Sessions Trial No.75/94 dated 18/09/1997, whereby, learned Special Judge found the present appellant and the co-accused Shashikant guilty under Section 8/18 and 8/30 r/w 21 of the Act and sentenced them to 10 years R.I. and fine of Rs.1,00,000/- under Section 8/18 NDPS Act and 5 years R.I. and Rs.50,000/- fine under Section 8/30/21 NDPS Act with default stipulation.

2) According to the prosecution story, Police Station Afzalpur, District Mandsaur received a source information on 23/03/1994, that the present appellant along with co-accused went on *Kuchdourlaukhedi* Road in a *Nallah* for making *Smack* from *Opium.* The information received at the police station was recorded in the daily diary. A memo was prepared and another memo showing inability to obtain warrant due to paucity of time was also prepared. The intimation was sent to the higher officers of the police. They took the prosecution witnesses with them and proceeded towards the spot, where, as per the information, the present appellant along with co-accused were trying to make *Smack* from *Opium.* The police party found the present appellant and co-accused sitting at the *Nallah*. They started running away, however, they were caught. After they were caught, they were given necessary information about the search and after completing all the formalities, search was made and the contraband *Opium* was seized from their possession. 1 kg. *Opium* was seized from possession of co-accused Shashikant and from possession of the present appellant 2 kg. and 60 gm. *Opium* was seized. Four samples were taken out, weighing 30 gms. each from two substance found from possession of both the accused persons and the samples were sent for examination and on examination, it was found that the seized contraband contained 3.20 and 3.31% *Morphine*, and therefore, it was held that the contraband was

Opium. After due investigation, the charge-sheet was filed.

3) The accused were charged initially under Section 8/21 NDPS Act for keeping in their possession the contraband substance in commercial quantity, however, subsequently, the charge under Section 8/30/21 was also added for having in possession the instruments and other material, chemicals etc. for preparation of *Smack* from *Opium.*

4) Learned Special Judge found the appellant and the co-accused guilty and sentenced them as aforesaid, against which, this appeal is filed on the ground that :-

(a) There are non-compliance of various provisions of NDPS Act, which is fatal to the prosecution.

(b) No FSL form was prepared and sent to the laboratory, and therefore, tempering of the samples could not be ruled out.

(c) Report of the Chemical Analyser was not specific and the procedure adopted for testing of samples was also not a permissible procedure.

(d) There is a violation of provisions of Section 52, 55 and 57 of NDPS Act, which has caused serious prejudice to the appellant.

(e) There are also no proof to show that the contraband and the samples were kept in a safe custody after they were seized allegedly from possession of the present appellant.

(f) The *Panch-witnesses* have not supported the

prosecution case, and therefore, in absence of independent witnesses, conviction can not be based on the statements of prosecution witnesses, who were all interested as police personnel.

(g) There are various inconsistencies, discrepancies, infirmities and contradictions in the statements of prosecution witnesses. Trial Court has ignored all these contradictions and infirmities, and therefore, the impugned judgment can not sustain. The decision is erroneous and liable to be set-aside, and therefore, it is prayed that the decision be set-aside.

5) Learned counsel for the respondent/State supports that impugned judgment and prays that it should be confirmed.

6) Before proceeding further to consider the appeal on merit, it may be mentioned here that co-accused Shashikant also filed a separate appeal - Cr.A. No.1140/1997, however, he expired during pendency of the appeal, and therefore, the appeal was dismissed as abated. Accordingly, at present, case of the present appellant only remains to be considered.

7) Learned counsel for the appellant during the argument submits that he wants to press the appeal only on a single ground that the seized contraband was never produced before the Court during trial and for this purpose, he placed reliance on the judgment of Hon'ble Apex Court in the case of ***Jitendra and Another*** vs. ***State of M.P.*** **[2004 SCC (Cri.) 2028]**. Hon'ble Apex

Court in para 5 and 6 of the judgment observed as under : -

> â□□**5**. 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 Rejendra Pathak (PW 7), Angad Singh (PW 8) and Sub-Inspector D.J. Raj (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 sample 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 Criminal Procedure Code 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. â¦.....â

8. The principle laid down in this case was that, when a seized contraband was not produced before the Trial Court, it was not a mere procedural irregularity but it causes serious prejudice to the accused. Hence, it is fatal to the prosecution. The principle laid down in this case was subsequently followed in the case of ***Ashok @ Dangra Jaiswal*** vs. ***State of M.P.*** **[2011 (2) JLJ 1 (SC)]**. Hon'ble Apex Court quoted the above quoted passage of **Jitendra and Another (Supra)** and found that when seizure witnesses are turned hostile and do not support the prosecution case and the contraband seized articles and substance were also not produced before the Trial Court, this lapse on the part of prosecution causes serious prejudice to the accused, and therefore, the

conviction is liable to be set-aside.

9. In the light of the principle laid-down by Hon'ble Apex Court in these two cases, this Court has to now see whether in this case the contraband substance was produced before the Court.
10. Ratanlal (PW/4) is a seizure witness. He admitted that he signed Ex.-P/27. It appears that the original seizure memo was not available before the Trial Court, and therefore, the copy, which was sent to the District Judge was called by the Trial Court and that copy was exhibited as Ex.-P/27. When the copy was made available in the record of Trial Court, this witness was recalled on 09/08/1997. Para 5 to 8 of the statement of witness Ratanlal may be quoted below, which indicates that the contraband seized substance and other articles, which were allegedly used for making of *smack* from *opium* were produced before the Court. Para 5 to 8 are quoted below :-

8. **5- tIrh iapukek izn'kih027 ij esjs ch ls lh Hkkx ij gLrk0 ih027 gsA**

6- xokgk dks U;k;ky; es is'k eq)seky yky jax dk ,oa gjs jax dk IykLVhd dk Vc] rjktq] ckV]N bR;kfn crk, x, rFkk lHkh eq)seky crk, x, rks xokgk dk dguk gs fd esjs lkeus rks flQZ gjk Vc tIr gqvk Fkk tks fd esus Fkkus esa ns[kk FkkA gjk Vc fdl vkneh ls tIr gqvk Fkk ;g eq>s ekyqeA

7- vkfVZdy ,e dh uequk lhy ds dkxt esjs , ls ,Hkkx ij gLrk0 gs bl dkxt ij piMh dh lhy esjs lkeusugha yxk;h FkhA

Â¼uksV %& bl pj.k ij vkfVZdy lh] Mh] bZ ,Q ds lsEiy tks fd U;k;ky; dh lhy ls lhy cUn gs dh lhy [kksyh x;h tks

fd fiNyh ckj U;k;ky; esa lsEiy lhy cUn gq, FksAÂ½
8- ,Q0 ,l0 ,y0 ls okil vk, [kkyh [kksds ijfpidh gq;h tIrh phV xokgk dks fn[kk;h x;h rks mldk dguk gs fd tIrh phV ij mlds nLr[kr ij t:j gs ijUrq esjs lkeus ,slh iqfM;k ugha cuk;h x;h vksj ml ij phV ugha fpidk;h x;hA ,Q0 ,l0 ,y0 ls vk, gq, [kkyh [kksds vkfVZdy lh ,oa Mh gsA
Â¼uksV %& bl pj.k ij Jh ,e0 ,y0 'kekZ] isuy yk;j us lk{kh dks i{k fojks/kh ?kksf"kr djus dk fuosnu fd;k tks fd vfHkys[k ns[kus ds ckn Lohkj fd;k x;kA Jh 'kekZ ds fuosnu ij mUgsa fyfMax iz'ku iqNus dh vuqefr nh x;hAÂ½

11. This witness was recalled on 09/08/1997. Before that, the Seizing Officer Suryabaksh Singh Parihar was recalled on 25/07/1997. Para 10 to 14 and 17 are quoted below :-

11. **10- fnukad 23&3&94 dks vQhe ,oa vU; lkeku tIr fd;kFkk mldk tIrh i=d esjs }kjk cuk;k x;k FkkA**
11- esus 3 izfr esa tIrh i=d cuk;k Fkk ,d izfr Mh0ts0 lkgkc dks Hksth tkrh gs] nqljh izfr ,l0Mh0vks0ih0 dks Hksth tkrh gs vksj eqy izfr Mk;jh esa jgrh gs tks pkyku ds lkFk is'k dh tkrh gsA ;g dkcZu izfr esjs }kjk r;;kj dh x;h Fkh tks fd eqy dks dkCkZu izfr gsA dkcZu izfr tIrh i=d ij iznz'k ih0 27 vafdr fd;k x;kA tIrhi=d izn'kih027 ij esjs , ls , Hkkx ij gLrk0 gsA
12- tIrh i=d ij xokgks us rFkk vfHk;qDr us esjs lkeus gLrk{kj fd, Fks tks ch ls ch] lh ls lh] Mh ls Mh gsA vfHk;qDr 'k'khdkar usbZlbZ Hkkx ij esjs lkeus vxqBk fu'kkuh dh FkhA
13- vfHk;qDr 'kf'kdkar ls ,d fdyks vQhe tIr dh FkhA tksvkfVZdy , dh gsA vfHk;qDr gfj'k ls nks fdyks 60xzke vQhe tIr dhFkh tks vkfVZdy ^^ch^^ gsA tIrh djus ds ckn esus 30&30 xzke ds lsEiy fudyks FksA lsEiy vkfVZdy lh] Mh] bZ rFkk ,Q gsA
14- eksds ls Lesd cukus dk lkeku tIr fd;k Fkk vkfVZdy ^^th^^ dk yky Vc] vkfVZdy ,p dk gjk Vc tIr fd;k Fkk] nks lQsn IykLVhd ds fMCcs vkfVZdy vkbZ] rjktq vkfVZdy ts-] ckV vkfVZdydsikap ckV] vkfVZdy ,y dk pquk] uequk lhy vkfVZdy ,e gsA esus iapks rFkk esjs

glrk{kj dh phV rFkk vkjksih ds gLrk{kj dhphV lHkh eq)ksey ij fpidk;h FkhA ikoMj o pquk Fksys es gs tks vkfVZdy ,u vksj vks gsA

15----------

16----------

17- vQhe ds eq)seky ij vkfVZdy , vksj ch ij ,d dkxt fpidk gqvk gs ijUrq og i