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Beta @ Ram Kinker Vs. State of M.P.

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Court : Madhya Pradesh

Decided On : Jun-20-2012

Appellant : Beta @ Ram Kinker

Respondent : State of M.P.

Judgement :

(1) HIGH COURT OF M. P. JUDICATURE AT JABALPUR CRIMINAL APPEAL NO. 1163 of 1996 Beta alias Ram Kinker Versus. State of M.P. For appellant : Shri Surendra Singh Senior Advocate assisted by Shri Manish Mishra, Advocate. For respondent : Shri Umesh Pandey, GA

JUDGMENT
(Oral) (Passed on 20.6..2012) U.C. MAHESHWARI J.

1. This appeal is preferred by the appellant/accused being aggrieved by the judgment dated 9.7.96 passed by the Special Judge (Constituted under the Narcotic Drugs and Psychotropic Substances Act, 1985) in Special Case No.88/95 convicting the appellant under section 8/20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short `the Act') with a direction to undergo for RI 2 years with fine of Rs.5000/-, in default of payment of fine, further RI one year. As per findings of the above mentioned judgment, the appellant was found in possession of 1.950 Kg of the contraband substance the Ganja.

2. The facts giving rise to this appeal in short are that on dated 10.8.95 Shri Phool Singh Tekam, Sub Inspect of Police, being posted as Incharge of Social Security Scott (Samajik Suraksha Dasta) Satna, received information from the informer that some unknown person, in a attachi, carrying contraband substance the Ganja, is standing at Dhawari Square. He apprised such information through telephone to City Superintendent of Police Satna and also endorsed the same in the (2) Rojnamcha Sanha Ex.P/10 at police station Kotwali. Subsequent to it, accompanied with the staff member ASI N.P.Shrivastav, Head Constable Ramdev and four constables proceeded towards the aforesaid square where near the Girls School, he found the appellant with a attachi. At the same time City Superintendent of Police also reached there. In presence of such senior police officer and the independent witnesses, namely, Munna Singh alias Gopal (PW 2.and Prem Lal (PW 3), he took the consent of the appellant to carry-out his search and pursuant to that the same was carried out. In such search from the possession of the appellant a key was found by which the attachi was opened in which two packets covered with paper were found. Out of them, in one packet one k.g and in another packet 950 gram of contraband substance the Ganja was found. The same was seized and out of aforesaid both the seized packets, the sample of 30 grams were taken out. The samples and the remaining substance was sealed, Dehati Nalishi was drawn-up and thereafter the appellant was arrested. Subsequent to the aforesaid proceedings, he accompanied with accused and alleged substance came to the Police Station Kotwali, Satna where he endorsed his arrival in the Rojnamcha Sanha of such Police Station. He also informed about the arrest of the appellant and the seizure of the substance and Dehati Nalishi to the City Kotwali, on which, the FIR for the offence of section 20 of the Act was registered against the appellant. Thereafter the aforesaid samples of the seized substance were sent to the FSL Sagar for its chemical examination from where the report was received according to which the same was found to be the contraband substance the Ganja. After holding the investigation on establishing the prima facie circumstance against the appellant for the aforesaid offence, he was charge sheeted for his prosecution under the aforesaid section.

3. On evaluation of the charge-sheet, the charge of section 20 of the Act was framed against the appellant. He abjured the guilt, on which, the trial was held, (3)

after recording the evidence of the prosecution as well as the defence, on appreciation, after holding guilty to the appellant, he was punished with the sentence as mentioned above. The same is under challenge in this appeal.

4. Shri Surendra Singh, learned Senior counsel of the appellant after taking me through the record of the trial court along with the impugned judgment said that the investigating agency had utterly failed to comply the mandatory provisions of sections 42 and 55 of the Act. In the lack of such mandatory compliance, the impugned conviction of the appellant is not sustainable. Besides this, he also assailed the impugned judgment on other grounds saying that from the place of seizure of the substance in which manner it was handled by the investigating officer and his companions upto the Police station and after reaching to the Police Station in which manner it was dealt with or was kept in whose safe custody, have not been proved. Even in this regard neither any Rojnamcha entry nor any register of Malkhana of the concerning Police station has either been produced or proved on the record. In the lack of it, it could not be deemed that after seizing the substance the same was properly handled and kept in some safe custody from where the sample was sent to the FSL for its chemical examination. According to him, unless the chain of keeping the seized substance and its sample in the safe custody and handled by the responsible person properly upto reaching the samples to the FSL is proved, the appellant could not be convicted mere on the basis of FSL report. Because in the lack of such material evidence it could not be assumed or deemed that the sample of the same substance, as alleged seized from the appellant, was sent to the FSL. He further said that except the Rojnamcha Sanha Ex.P/10 in which the entry regarding information of the informer was endorsed and the entry of the Rojnamcha (Ex.P/13) regarding arrival of said Police Officer from the place of seizure to the Police Station after seizing the substance, no other relevant Rojnamcha entries has neither been produced nor proved on the record. (4) The entry in the Rojnamcha regarding departure of the aforesaid police officer Phool SinghTekam (PW 4.accompanied with the other police officials and the independent witnesses to the alleged place of the seizure, has neither been produced nor proved on the record. In the lack of it, it could not be assumed that on the date of the incident such police officials visited the place of incident shown by the informer. In continuation he said that the search memo of

the appellant as well as the seizure memo of the alleged substance and the other papers, as alleged prepared during the course of investigation in presence of the witnesses, have not been supported by the alleged witnesses Munna alias Gopal (PW 2.and PremLal (PW 3). In the available scenario of the case, mere on the basis of the testimony of the Investigating Officer Phool SinghTekam (PW 4), the appellant could not be convicted. He also said that by which process and person the alleged substance was weighed on the spot, the same has not been stated in the seizure memo of the substance or the memo prepared for preparing the samples (Ex.P/5 and P/6). In addition it was also argued that the entire seized substance was neither produced before the trial court nor marked the articles and in the lack of it, in view of the principle laid down by the Apex Court in the matter of Ashok Vs. State of M.P- (2011) 5 SCC 123.the impugned conviction could not be sustained. With these submissions, he prayed for extending the acquittal to the appellant by setting aside the impugned judgment by allowing the appeal.

5. On the other hand, Shri Umesh Pandey, learned Govt. Advocate, by justifying the impugned conviction and the sentence of the appellant said that the same is based on sound appreciation of the evidence and also is in conformity with law. It does not require any interference at this stage for extending the acquittal to the appellant. He further said that in the course of the investigation, the aforesaid mandatory provision of the Act has been duly complied with by the investigating agency so on such count also the appellant does not deserve for acquittal. He (5) fairly conceded that the alleged entire substance was neither produced nor marked as article in the trial court but no such objection was taken by the appellant in the trial court nor any demand to produce the same was made on behalf of the appellant, therefore, the appellant is not entitled to get any benefit on this count and prayed for dismissal of the appeal.

6. Having heard the counsel at length, keeping in view their arguments, after perusing the record, I am of the view that the impugned conviction of the appellant under the aforesaid section, due to following reasons, is not sustainable.

7. It is apparent on record that on receiving the information from the informer about having the possession of contraband substance Ganja with the appellant after

recording the same in the Rojnamcha Sanha Ex.P/10 at P.S City Kotwali, Satna, its intimation in compliance of section 42 of the Act, was not sent to the senior police officials. Although, in this regard, an explanation has been putforth by the prosecution that such information was given through telephonic message from PS Kotwali to the office of City Superintendent of Police but in that regard the concerning Rojnamcha is neither produced nor proved on the record. In the lack of such Rojnamcha, it could not be assumed or deemed that such information was given to the City Superintendent of Police, Satna. It is also not proved that in which manner the independent witnesses were called at the Police Station before leaving the Police Station for the place of incident. In this regard neither any Rojnamcha nor the panchnama has been produced or proved on the record. This makes the presence of independent witnesses with the police party doubtful.

8. Besides the aforesaid, I have not found any panchnama showing that the appellant was informed in writing about his right to be searched in presence of some Gazetted officer or through Magistrate. It is undisputed fact that initially on carrying out the search of the appellant some key was found from his possession by which the attachi was opened. In that circumstance, in order to prove that the (6) key was recovered from the pocket of the appellant, the prosecution has to carry- out the search of the appellant after apprising him the right to be searched in the manner provided under the law. In the lack of it, mere on the basis of the consent letter of the appellant prepared by the seizing officer with the signatures of the above named independent witnesses giving consent by the appellant to carry out his search by said police officer does not fulfill the legal requirement of search in accordance with the section 50 of the Act or the concerning provision of the Cr.P.C.. Whenever the search of the person is required and there is no time with the police officer to get the search warrant from the concerning Magistrate or the Authority then he could have been searched only after preparing the panchnama stating the reasons to carry-out the search without getting the search warrant from the Magistrate or the concerning Authority. So, in such premises also the initial search was not carried out by the investigating agency in accordance with the procedure prescribed under the aforesaid provisions of the law.

9. On further examination of the matter, I have found that before taking the search of the appellant, the police officials and other witnesses were given their search to the appellant by Ex.P/3 in which no implicating thing was found in their possession. Thereafter, on carrying out the search of the appellant, a key of the attachi was found in his pocket for which panchnama Ex.P/3 was prepared. Such key was also seized by Ex.P/4 and on opening the attachi, the alleged substance in two different packets of 1 kg and 950 grams, as stated above, were found in such attachi. The same was seized by Ex.P/5. I have not found any averment in the aforesaid seizure memo Ex.P/5 showing that on what basis the alleged substance was stated to be the Ganja because it is not stated that either by tasting by tongue or by smelling through nose it was found to be the Ganja. So in such way also the seizure memo appears to be incomplete on material count. It is also apparent that by which person and in which manner and by which instrument it was weighed on (7) the spot. The same has not been mentioned in the panchnama. Even on perusing the panchnama Ex.P/6, I have not found in which manner the sample of 30 grams of such substance was weighed and sealed separately because no person has been examined in this regard to show that such substance was weighed by him. Even the panchnama of weighing the substance has not been prepared. So, in such premises both seizure panchnama and the sample panchnama Ex.P/5 and P/6 become suspicious.

10. Besides the aforesaid after seizing the alleged substance and arresting of the appellant from the place of seizure upto the police station and further till sending the sample to the FSL Sagar, in which manner the seized substance and the samples were handled by the investigating agency, the same has neither been explained nor proved on the record by examining the concerning witnesses by whom the same was handled. In such circumstance, the inference could be drawn that from the place of incident the sample was handled by various persons at different places without preparing any panchnama or making any entry in the Rojnamcha or in other record kept for this purpose. In the lack of such material evidence and deposition of concerning witnesses, it could not be assumed that the sample and the seized substance was safely and properly handled by the prosecution agency till sending the sample to the FSL Sagar and also subsequently. The Rojnamcha entries in this regard have also neither been filed

nor proved on the record. In such circumstances the possibility to temper the substance and its sample could not be ruled out. The benefit of this lacuna left by the prosecution should be given to the appellant as laid down by the Apex Court in the matter of The State ofRajasthan Vs. Daulat Ram-AIR 198.SC 131.in which it was held as under :- Where the samples of opium changed several hands before reaching the public analyst and yet none of those in whose custody the samples remained were examined (8) by the prosecution to prove that while in their custody the seals on the samples were not tampered with, the inevitable effect of the omission was that the prosecution failed to rule out the possibility of the samples being changed or tampered with during the period in question- a fact which had to be proved affirmatively by the prosecution. Consequently, the accused could not be convicted under S.9A. In such a case, the prosecution could not be allowed to fill-up the gaps in the prosecution story at the appellate or revisional stage... .....Placitum 11. Apart the above4 from the place of seizure, on reaching the seizing officer to the Police Station the seized substance was kept in the safe custody in this regard, the Rojnamcha entry and the entry of the malkhana register has neither been produced nor proved on the record. In the lack of it, it could not be assumed that the entire substance and the sample were kept in the safe custody in compliance of the provision of section 55 of the Act till sending the same to the FSL.

12. It is also apparent that the person who took the samples as carrier to the FSL has neither been examined nor any explanation in this regard has been putforth on the record. Even the concerning Rojnamcha entries the departure of the police official taking the sample to FSL, has neither been produced nor proved on record. In order to prove that the same sample prepared on the spot were sent to FSL, the prosecution was bound to produce and prove the concerning entries of the Rojnamcha whereby the same was kept in the Malkhana of the Police Station and also by which the samples were taken-out from such Malkhana for sending the same to FSL. In the lack of such positive and admissible evidence, mere on the testimony of the Investigating Officer, it could not be assumed that the same sample was sent to the FSL and pursuant to it, it could not be said that the prosecution has proved beyond reasonable doubt that the seized alleged substance (9) from the possession of the appellant was contraband substance the

Ganja.

13. In the aforesaid premises, it is apparent that the prosecution has failed to prove the compliance of section 42 and 55 of the Act.

14. It is also apparent that even after arrival to the Police station any information regarding the seized substance from the appellant with all relevant requisite particulars has not been sent to the senior officials in writing. No document in this regard has been produced on record. If such information was sent through telephonic message even then in the lack of proving the concerning Rojnamcha entries such version of the prosecution could not be relied on.

15. Apart the above, it is apparent fact on record that the independent witnesses of all the aforesaid panchnama including the seizure memo, namely, Munna alias Gopal (PW 2.and Prem Lal (PW 3.have not supported to the prosecution case. On the contrary on recording their deposition they turned hostile. Thus, in the lack of independent supporting evidence and in the light of the aforesaid lacunas in the case left by the prosecution, mere on the testimony of the Investigating Officer Phool SinghTekam (PW 4.the impugned conviction of the appellant could not be sustained.

16. In view of the aforesaid discussion, there is no option with the Court except to hold that the trial court has committed grave error in holding guilty to the appellant for the alleged offence of the Act for having possession of 1 kg and 950 grams contraband substance the Ganja. Pursuant to it, the appellant deserves to be acquitted from the alleged charge.

17. After coming to the conclusion that the trial court has committed error in holding guilty to the appellant for the alleged offence, taking into consideration that the alleged substance was neither produced nor marked an article before the trial court, I do not find fit to consider such question or in any case to remand the matter to the trial court under section 386 of the Cr.P.C to extend such opportunity (10) to the prosecution in the matter as even after producing and marking the same as article, the aforesaid technical lacunas left by investigating agency could not be cured by the prosecution. Therefore, this question raised by the appellant's

counsel does not require any consideration in the present matter.

18. In view of the aforesaid discussion, this appeal is allowed and the impugned judgment of conviction and sentence of the appellant is hereby set aside. Pursuant to it, he is acquitted from the charge of section 8/20 of the Act. Consequently, his awarded punishment is also set aside. His bail bonds are hereby discharged. The amount of fine, if deposited, be refunded to him after due verification.

19. The appeal is allowed as indicated above. (U.C.MAHESHWARI) JUDGE MKL (11)

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