

Sharukh Vs. State Of Karnataka

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Court : Karnataka Kalaburagi

Decided On : Jul-05-2024

Judge : S.Vishwajith Shetty

Appeal No. : CRL.A 200230/2023

Appellant : Sharukh

Respondent : State Of Karnataka

Judgement :

- 1 - NC:

2024. KHC-K:4643 CRL.A No.200230 of 2023 C/W CRL.A No.200147 of 2023 IN THE HIGH COURT OF KARNATAKA, KALABURAGI BENCH DATED THIS THE5H DAY OF JULY, 2024 BEFORE THE HON'BLE MR. JUSTICE S.VISHWAJITH SHETTY CRIMINAL APPEAL No.200230 OF2023(374) C/W CRIMINAL APPEAL No.200147 OF2023(374) IN CRIMINAL APPEAL No.200230 OF 2023 BETWEEN: SHARUKH S/O AYYUB KHAN, NOW AGED28YEARS, OCC: COOLIE, R/O. TITIWALA UMBARNI ROAD, MUMBAI CITY, MAHARASHTRA-421 605. APPELLANT (BY SRI SANTOSH KUMAR B. METRI, ADVOCATE) AND: STATE OF KARNATAKA, THROUGH HUMNABAD POLICE STATION, HUMNABAD, TQ: HUMNABAD, DIST: BIDAR. REP.BY THE ADDL. SPP, HIGH COURT OF KARNATAKA, KALABURAGI BENCH-585 103. RESPONDENT (BY SRI VEERANAGOUDA MALIPATIL, HCGP) - 2 - NC:

2024. KHC-K:4643 CRL.A No.200230 of 2023 C/W CRL.A No.200147 of 2023 THIS CRL.A. IS FILED U/S.374 (2) OF CR.P.C PRAYING TO ALLOW THE APPEAL AND SET ASIDE THE

JUDGMENT
OF CONVICTION AND

ORDER

OF SENTENCE DATED 29.08.2022 OF II ADDL. DIST. AND SESSIONS JUDGE BIDAR, SITTING AT BASAVAKALYAN IN SPL. CASE NO.312/2019 AND ACQUIT THE APPELLANT HEREIN FOR THE CHARGES FOR WHICH HE WAS CONVICTED. IN CRIMINAL APPEAL No.200147 OF 2023 BETWEEN: SHUBHAM S/O ANUPCHAND CHODHARI, AGED ABOUT 20 YEARS, OCC: COOLIE, R/O. DAANIYA SAKKARA ILLABAD, UTTAR PRADESH, NOW R/AT. AMBEWALI UMBARNI ROAD, MUMBAI-400 097. APPELLANT (BY SRI B.C. JAKA, ADVOCATE) AND: THE STATE OF KARNATAKA THROUGH HUMNABAD POLICE STATION, DIST: BIDAR-585 330, NOW REPRESENTED BY ADDL. SPP., HIGH COURT OF KARNATAKA, KALABURAGI BENCH-585 107. RESPONDENT (BY SRI VEERANAGOUDA MALIPATIL, HCGP) THIS CRL.A. IS FILED U/S.374 (2) OF CR.P.C PRAYING TO SET ASIDE THE

JUDGMENT
OF CONVICTION AND

ORDER

OF SENTENCE DATED 29.08.2022 IN SPL.C. NO.312/2021 PASSED BY THE II ADDL. DISTRICT AND SESSIONS JUDGE BIDAR, SITTING AT BASAVAKALYAN BY ALLOWING THIS APPEAL. CONSEQUENTLY ACQUIT THE APPELLANT/ ACCUSED OF THE CHARGES LEVIED AGAINST HIM, FOR THE OFFENCES PUNISHABLE U/SEC. 20(b)(II)(b), 20(c) OF NDPS ACT.-. 3 - NC:

2024. KHC-K:4643 CRL.A No.200230 of 2023 C/W CRL.A No.200147 of 2023 THESE APPEALS COMING ON FOR FURTHER HEARING, THIS DAY, THE COURT DELIVERED THE FOLLOWING:

JUDGMENT

These two appeals under Sections 374(2) of Cr.P.C arise out of judgment and order of conviction and sentence dated 29.09.2022 passed by the Court of the II Additional District and Sessions Judge, Bidar sitting at Basavakalyan in Special Case No.312/2021 and therefore the appeals are heard together and disposed of by this common judgment.

2. Heard the learned counsel for the parties.

3. It is the case of the prosecution that on 19.02.2019 at about 9.45 a.m., near Gate-I of Humnabad Bus Stand within the limits of Humnabad Police Station, accused Nos.1 and 2 were found illegally transporting the contraband article - ganja, which totally weighed 30 kilogram. The accused were apprehended and from their possession ganja weighing 30 kilograms was seized and subjected to panchanama. Thereafter, the seized contraband article and the apprehended accused were - 4 - NC:

2024. KHC-K:4643 CRL.A No.200230 of 2023 C/W CRL.A No.200147 of 2023 brought to the police station and FIR in Crime No.24/2019 was registered. After investigation, charge-sheet was filed against accused Nos.1 and 2 for the offences punishable under Sections 20(b)(ii), 20(B) and 20(C) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the NDPS Act for brevity).

4. The Trial Court after taking cognizance of the charge-sheeted offences had framed charges against accused, read over and explained the same to the accused. Since the accused pleaded not guilty and claimed to be tried, the prosecution in order to prove its charges against the accused had examined eight charge-sheet witnesses as PW.1 to PW.8, got marked 11 documents as Ex.P.1 to Ex.P.11 and 17 material objects were got marked as MO-1 to MO-17. After the prosecution completed its side of evidence, the Trial Court had recorded the statement of the accused under Section 313 of Cr.P.C. However, no defence evidence was led on behalf of accused, but one document was marked as Ex.D1 on - 5 - NC:

2024. KHC-K:4643 CRL.A No.200230 of 2023 C/W CRL.A No.200147 of 2023 behalf of defendant. The Trial Court thereafter heard the arguments addressed on both sides and vide impugned judgment and order, convicted accused Nos.1 and 2 for the offences punishable under Sections Sections 20(b)(ii), 20(B) and 20(C) of the Narcotic Drugs and Psychotropic Substances Act, 1985 and sentenced them to undergo rigorous imprisonment for a period of 10 years and pay fine of `20,000/- each and in default to undergo simple imprisonment for a further period five months. Being aggrieved by the said judgment and order of conviction and sentence passed by the Trial Court, the accused Nos.1 and 2 are in appeal.

5. Learned counsel for the appellants submits that the Trial Court has erred in convicting the appellants for the alleged offences. He submits that there is a delay in sending the contraband article seized to the Forensic Science Laboratory for chemical examination. Therefore, the chances of tampering with the contraband article cannot be ruled out. He submits that the Forensic Science - 6 - NC:

2024. KHC-K:4643 CRL.A No.200230 of 2023 C/W CRL.A No.200147 of 2023 Laboratory Officer who has issued report as per Ex.P.10 is not examined by the prosecution. He also submits that there is no compliance of Section 52A of the NDPS Act in the present case and therefore the Trial Court was not justified in convicting the appellants.

6. Per contra, learned High Court Government Pleader for respondent/State has argued in support of the impugned judgment and order of conviction and sentence. He submits that even though PW.2 and PW.3 who are the panch witnesses have not supported the case of the prosecution, the charges have been proved against the appellants beyond reasonable doubt by the prosecution on the basis of the oral and documentary evidence available on record. He submits that all the official witnesses have supported the case of the prosecution and there is no reason to disbelieve their evidence. He submits that sample drug has tested positive and Ex.P10 report from FSL clearly demonstrates the same. Accordingly, he prays to dismiss the appeals.-. 7 - NC:

2024. KHC-K:4643 CRL.A No.200230 of 2023 C/W CRL.A No.200147 of 2023 7. FIR in Crime No.24/2019 was registered by the Humnabad Police Station, Bidar

against the appellants herein on the basis of the first information dated 19.02.2019 received from CW.1 (PW.6). In the first information, it is stated that, on 19.02.2019, when first informant was in the police Station he had received a credible information about two persons transporting contraband article - ganja and therefore after seeking permission from his higher officers, he had conducted a raid and apprehended accused Nos.1 and 2 along with contraband article - ganja, which totally weighed 30 kilograms.

8. The prosecution in order to prove its case against the accused has in all examined eight charge- sheet witnesses as PW.1 to PW.8. PW.1 is the gazetted officer who was a Member of the raiding squad. PW.2 and PW.3 are the panch witnesses to Ex.P2 - seizure panchanama of contraband article - ganja that was seized from the possession of accused Nos.1 and 2. PW.4 is a - 8 - NC:

2024. KHC-K:4643 CRL.A No.200230 of 2023 C/W CRL.A No.200147 of 2023 vegetable vendor and his weighing machine was used by the raiding squad to weigh the contraband article - ganja that was seized from the possession of accused Nos.1 and 2. PW.5 is the Investigating Officer who had registered the FIR in Crime No.24/2019 and after completing the investigation had filed the charge-sheet in the present case. PW.6 is the first informant in the present case. He was working as a Sub-Inspector of Police in Humnabad Police Station as on the date of incident. He speaks about the raid conducted by him along with PW.1, PW.7 and PW.8. He also speaks about seizure of contraband article - ganja totally weighing 30 kilograms from the possession of accused. PW.7 and PW.8 are the Police Constables who were the Members of the raiding squad. These witnesses also speak about the raid conducted on 19.02.2019 and about the seizure of contraband article - ganja from the possession of accused. Ex.P.1 is the notice issued by PW.1 gazetted officer to the accused persons in compliance of requirement of Section 50 of the NDPS Act. Ex.P.2 is the panchanama under which contraband article - ganja - 9 - NC:

2024. KHC-K:4643 CRL.A No.200230 of 2023 C/W CRL.A No.200147 of 2023 weighing 30 kilogram was seized from the possession of accused Nos.1 and 2 along with other articles which included cash and mobile phone of the accused.

9. From a perusal of Ex.P.2, it is seen that sample of the contraband article - ganja was collected by PW.6 at the time of preparing the seizure panchanama and the said sample of the contraband article was sealed and kept separately. Subsequently, the said sample of the contraband article was forwarded by the Investigating Officer to the Forensic Science Laboratory for the purpose of chemical examination and Ex.P.10 is the report received from the Forensic Science Laboratory, which confirms that the sample of the contraband article - ganja had tested positive for cannabis (ganja).

10. Perusal of the available material on record would go to show that prior to forwarding the sample of the contraband article - ganja to the Forensic Science Laboratory the inventory of the seized contraband article - ganja was not prepared and got certified before the - 10 - NC:

2024. KHC-K:4643 CRL.A No.200230 of 2023 C/W CRL.A No.200147 of 2023 jurisdictional Magistrate by the Investigating Officer as required under Section 52A of the NDPS Act.

11. Section 52A of sub-section (2), (3) and (4) of NDPS Act provides for the procedure and manner of seizing, preparing of inventory of the seized contraband article, drawing of sample and getting inventory certified by the Magistrate etc., 12. Section 52A of NDPS Act reads as follows : 52A. Disposal of seized narcotic drugs and psychotropic substances.-. (1) The Central Government may, having regard to the hazardous nature, vulnerability to theft, substitution, constraint of proper storage space or any other relevant consideration, in respect of any narcotic drugs, psychotropic substances, controlled substances or conveyances, by notification in the Official Gazette, specify such narcotic drugs, psychotropic substances, controlled substances or conveyance or class of narcotic drugs, class of psychotropic substances, class of controlled substances or conveyances, which shall, as soon as may be after their seizure, be disposed of by such officer and in such manner as that Government may, - 11 - NC:

2024. KHC-K:4643 CRL.A No.200230 of 2023 C/W CRL.A No.200147 of 2023 from time to time, determine after following the procedure hereinafter specified. (2) Where any narcotic drugs, psychotropic substances, controlled substances or

conveyances has been seized and forwarded to the officer-in-charge of the nearest police station or to the officer empowered under section 53, the officer referred to in sub-section (1) shall prepare an inventory of such narcotic drugs, psychotropic substances, controlled substances or conveyances containing such details relating to their description, quality, quantity, mode of packing, marks, numbers or such other identifying particulars of the 3[narcotic drugs, psychotropic substances, controlled substances]. or conveyances or the packing in which they are packed, country of origin and other particulars as the officer referred to in sub-section (1) may consider relevant to the identity of the narcotic drugs, psychotropic substances, controlled substances or conveyances in any proceedings under this Act and make an application, to any Magistrate for the purpose of - (a) certifying the correctness of the inventory so prepared; or (b) taking, in the presence of such Magistrate, photographs of such drugs, substances or - 12 - NC:

2024. KHC-K:4643 CRL.A No.200230 of 2023 C/W CRL.A No.200147 of 2023 conveyances and certifying such photographs as true; or (c) allowing to draw representative samples of such drugs or substances, in the presence of such Magistrate and certifying the correctness of any list of samples so drawn. (3) Where an application is made under sub-section (2), the Magistrate shall, as soon as may be, allow the application. (4) Notwithstanding anything contained in the Indian Evidence Act, 1872 (1 of 1972) or the Code of Criminal Procedure, 1973 (2 of 1974), every court trying an offence under this Act, shall treat the inventory, the photographs of narcotic drugs, psychotropic substances, controlled substances or conveyances and any list of samples drawn under sub-section (2) and certified by the Magistrate, as primary evidence in respect of such offence.

13. In the present case, there is absolutely no compliance of the aforesaid provisions of law. Section 52(A) of the NDPS Act deals with seizure of contraband article, forwarding the seized contraband article and obtaining certification from the relevant Magistrate.-. 13 - NC:

2024. KHC-K:4643 CRL.A No.200230 of 2023 C/W CRL.A No.200147 of 2023 Section 52(A) of the NDPS Act considers that the certified inventory of seized substance along with any list of seized samples as primary evidence in the trial.

14. From a reading of the aforesaid provisions, it is clear that, whenever a contraband article is seized the officer referred to in sub-section (1) of Section 53 of NDPS Act, shall prepare the inventory of the seized contraband articles in detail and the description of the seized contraband article, mode of packing, identify marks and quantity in each pack shall be mentioned and thereafter an application shall be filed to the jurisdictional Magistrate for the purpose of certifying the correctness of the inventory and also for allowing to draw samples of the contraband article in the presence of the Magistrate for forwarding the same to the Forensic Science Laboratory for chemical examination.

15. Mere fact that the samples were drawn in the presence of a gazetted officer is not sufficient for compliance of the mandate of Sub Section (2) of Section - 14 - NC:

2024. KHC-K:4643 CRL.A No.200230 of 2023 C/W CRL.A No.200147 of 2023 52A of the NDPS Act. In the case on hand, the mandatory requirement of Section 52A is not at all complied and therefore, the photograph - Ex.P3, samples drawn in the presence of gazetted officer under panchanama - Ex.P2 and the FSL report obtained as per Ex.P10 cannot be considered as primary evidence and in the absence of primary evidence, the trial gets vitiated.

16. In the case of Mangilal vs. State of Madhya Pradesh reported in 2023 INSC634 the Honble Supreme Court has observed Section 52A of the NDPS Act is a mandatory rule of evidence. In paragraph No.5 and 6 of the said judgment, it is observed as follows: 5. Sub-section (2) of Section 52A of the NDPS Act mandates a competent officer to prepare an inventory of such narcotic drugs with adequate particulars. This has to be followed through an appropriate application to the Magistrate concerned for the purpose of certifying the correctness of inventory, taking relevant photographs in his presence and certifying them as true or taking drawal of samples in his presence with due certification. Such an application can be filed for - 15 - NC:

2024. KHC-K:4643 CRL.A No.200230 of 2023 C/W CRL.A No.200147 of 2023 anyone of the aforesaid three purposes. The objective behind this provision is to have an element of supervision by the magistrate over the disposal of seized

contraband. Such inventories, photographs and list of samples drawn with certification by Magistrates would constitute as a primary evidence. Therefore, when there is non-compliance of Section 52A of the NDPS Act, where a certification of a magistrate is lacking any inventory, photograph or list of samples would not constitute primary evidence.

6. The obvious reason behind this provision is to inject fair play in the process of investigation. Section 52A of the NDPS Act is a mandatory rule of evidence which requires the physical presence of a Magistrate followed by an order facilitating his approval either for certifying an inventory or for a photograph taken apart from list of samples drawn.

17. In the case of Mohammed Khalid and Another vs. State of Telangana reported in 2024 INSC158 the Honble Supreme Court in paragraph No.22 has observed as follows: 22. Admittedly, no proceedings under Section 52A of the NDPS Act were undertaken by the - 16 - NC:

2024. KHC-K:4643 CRL.A No.200230 of 2023 C/W CRL.A No.200147 of 2023 Investigating Officer PW-5 for preparing an inventory and obtaining samples in presence of the jurisdictional Magistrate. In this view of the matter, the FSL report(Exhibit P-11) is nothing but a waste paper and cannot be read in evidence.

18. In the present case, the samples from the seized contraband article was drawn by PW.6 in the presence of PW.1, who is a Gazetted Officer. No sample of the contraband article has been drawn in the present case in the presence of the Magistrate. The material on record also go to show that after seizure of the contraband article and before the sample of the contraband article was forwarded by the Investigating Officer to the forensic science laboratory for chemical examination, the jurisdictional Magistrate has not certified inventory of the contraband article or the sample, which was drawn by PW.6 at the time of preparing seizure panchanama - Ex.P2 in front of PW.1, who is a Gazetted Officer.

19. Section 52(A)(2) is introduced in the statute with an object to give some sanctity for the seizure made - 17 - NC:

2024. KHC-K:4643 CRL.A No.200230 of 2023 C/W CRL.A No.200147 of 2023 and also to prevent any mischief at the hands of the police officers or any other officer investigating the cases under the provisions of the NDPS Act. The punishment for the offences under the provisions of the NDPS Act depends upon the quantity of the contraband article seized and therefore, to rule out any foul play during the course of investigation, necessity of preparing the inventory and getting the same certified by the jurisdictional Magistrate within a reasonable time and drawing of sample from the seized contraband article becomes mandatory.

20. In the case of Yusuf @ Asif vs. State reported in 2021 INSC912 the Honble Supreme Court in paragraph Nos.15, 16 and 17 has observed as follows: 5. In Mohanlals case, the apex court while dealing with Section 52A of the NDPS Act clearly laid down that it is manifest from the said provision that upon seizure of the contraband, it has to be forwarded either to the officer incharge of the nearest police station or to the officer empowered under Section 53 who is obliged to prepare an inventory of the seized contraband and then to make - 18 - NC:

2024. KHC-K:4643 CRL.A No.200230 of 2023 C/W CRL.A No.200147 of 2023 an application to the Magistrate for the purposes of getting its correctness certified. It has been further laid down that the samples drawn in the presence of the Magistrate and the list thereof on being certified alone would constitute primary evidence for the purposes of the trial.

16. In the absence of any material on record to establish that the samples of the seized contraband were drawn in the presence of the Magistrate and that the inventory of the seized contraband was duly certified by the Magistrate, it is apparent that the said seized contraband and the samples drawn therefrom would not be a valid piece of primary evidence in the trial. Once there is no primary evidence available, the trial as a whole stands vitiated.

17. Accordingly, we are of the opinion that the failure of the concerned authorities to lead primary evidence vitiates the conviction and as such in our opinion, the conviction of the appellant deserves to be set aside. The impugned judgment and order of the High Court as well as the trial court convicting the appellant and sentencing him to rigorous imprisonment of 10 years with fine of Rs.1 lakh and in

default of payment of fine to undergo further imprisonment of one year is hereby set aside. - 19 - NC:

2024. KHC-K:4643 CRL.A No.200230 of 2023 C/W CRL.A No.200147 of 2023 21. Even in the case on hand, there is no compliance of the requirement of Sub Sections (2) and (3) of Section 52(A) of the NDPS Act and therefore, it is apparent that the seized contraband article and the samples drawn from the same would not be valid piece of primary evidence and therefore, no reliance can be placed either on Ex.P2 - seizure mahazar, Ex.P3 - photograph and Ex.P11 - report of the FSL. Under the circumstances, the impugned judgment and order of conviction and sentence passed by the Trial Court cannot be sustained. Accordingly, following order is passed:

ORDER

a. The criminal appeals are allowed. b. The impugned judgment and order of conviction and sentence passed by the Court of II Additional District and Sessions Judge, Bidar sitting at Basavakalyan in Special Case No.312/2021 dated 29.08.2022 and 30.08.2022 are set aside and the - 20 - NC:

2024. KHC-K:4643 CRL.A No.200230 of 2023 C/W CRL.A No.200147 of 2023 appellants/accused are acquitted for the charge sheeted offences. c. Their bail bonds, if any, stand cancelled. d. The fine amount, if any, deposited by the appellants/accused shall be refunded to them. e. In view of the disposal of the appeals, pending applications, if any, do not survive for consideration. Sd/- JUDGE SN/SRT List No.:

1. SI No.:

5.

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