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Single Bench (Criminal)

IN THE HIGH COURT OF JUDICATURE AT JABALPUR

Cr.A.No. 976 of 1998

CRIMINAL APPEAL UNDER SECTION 374 (2)OF THE CODE OF CRIMINAL PROCEDURE, 1973Appellant:
Accused

6584 (In Jail)

21.11.98

by Shri. S. L. Karmay

Advocate

Jaggumal Kukreja, aged about 45 years,
son of Keematmal Kukreja, resident of
House No. 43, Nagar Nigam Colony,
P.S. Saraswati Nagar, Raipur, Tahsil and
District Raipur, M.P.

versus

R. A. R.

Respondent:

The State of Madhya Pradesh

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HIGH COURT OF CHHATTISGARH AT BILASPUR

Criminal Appeal No. 976 of 1998

Appellant : Jaggumal Kukreja

VERSUS

Respondent : State of Madhya Pradesh
(Now C.G.)

Post for pronouncement of judgment on ..24th.. day of
December, 2014.

Sd/-
Goutam Bhaduri
Judge

24 /12/2014



सत्यमेव जयते

HIGH COURT OF CHHATTISGARH AT BILASPURCriminal Appeal No. 976 of 1998Appellant : Jaggumal Kukreja

VERSUS

Respondent : State of Madhya Pradesh
(Now C.G.)CRIMINAL APPEAL U/S. 374(2) OF THE CRIMINAL PROCEDURE CODESB: Hon'ble Shri Goutam Bhaduri, J.

Present:

Mr. S.K. Vyas, Sr. Advocate with Mr. Vishnu Koshta and Mr. Amit Vyas,
Counsel for the appellant.

Mr. Bhaskar Payasi, P.L. for the State.

JUDGMENT(Delivered on 24th day of December, 2014)

1. This is an appeal against the judgment/order dated 15.04.1998 passed by the learned Special Judge (NDPS) Raipur in Criminal Case No.302/1997 whereby the appellant has been convicted under sections 21/8 of the Narcotic Drugs and Psychotropic Substances Act, 1985 and sentenced to undergo R.I. for 10 years and to pay a fine of Rs.1,50,000/-, failing which, he shall further undergo R.I., for two years.
2. The prosecution case, in brief, is that on 06.8.1997 at about 3.30 p.m., the Incharge of Police Station Saraswati Nagar, Raipur, Bhojendra Kumar Uike received secret information that the appellant accused has kept narcotic substance in his house No.43, Nagar Nigam Colony, Raipur for sale. The same was recorded as Sanha No.294 in Rosnamcha register vide Ex.16-C which is a certified copy and thereafter the Mukhbir Panchnama was recorded in the presence of the Panch witnesses P.W.5 Pawan Singh Thakur and Deepak Singh Thakur (P.W.6), and a copy of which, was sent to the higher officers.

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Subsequently, since the search warrant could have taken some time, the reasons were written in Ex.P-20 and thereafter the Police Officers along-with other police party as also seizure witnesses P.W.5 and P.W.6 went to the spot i.e., the house of the appellant. On reaching the house of the appellant, the appellant was called in person and was present in the house. Thereafter, accused was informed vide Ex.P-7 that information has been received that he has kept some narcotic substance and therefore, a search was required. It was also the case of the prosecution that the appellant was informed of the fact that if he so desires, he can get search in the presence of any gazette officer or Executive Magistrate. On having given the consent at the back of Ex.P-7, search of the house of the appellant was made and the persons who went for such search, made the search in the house. It was recorded in the Panchnama vide Ex.P-8.

3. Further on search being made, from the drawing room of the appellant behind the wall under the cushioned bed, two polythene packets were found which on primary inspection were found to be brown sugar. Thereafter, both the packets were weighed which were of 104 & 103 grams respectively. Subsequently, the packets were sealed and seizure memo was prepared vide Ex.P-12 and thereafter, the Dehati Nalishi Ex.P-21 was prepared. The appellant was arrested u/s 20 of the NDPS Act and the sealed packets were deposited in the Malkhana which was received by P.W.4 Sankirtan Barik. After the arrest of the accused it was informed vide Ex.P-4 to the City Superintendent of Police. Subsequently, the sealed packets were sent for FSL vide Ex.P-1 through PW-1 Kalaram Khunte on 09.08.1997 and thereafter the FSL report was received on 23.08.1997 vide Ex.P-25 and according to the

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report, the powder was Diacetyl Morphine (Heroin) Subsequently, after the investigation, the charge sheet was filed u/s 21 of the Act.

4. During the course of trial the appellant abjured his guilt. The prosecution on its behalf had examined as many as 7 witnesses and the defence has examined 4 witnesses.
5. The learned court below after concluding the trial and evaluating the evidence on record had convicted the appellant accused as aforesaid. Hence, this appeal.
6. Learned counsel for the appellant would submit that that the date of incident in this case was 6.8.1997 and initially the *Rojnamcha* (daily register) was recorded by P.W.7 Bhojendra Kumar Uike and he himself seized the contraband article. Thereafter, further investigation was also carried out by the same witness P.W.7. He placed reliance on a case law reported in *AIR (SC) 2339 Megha Singh Vs. State of Haryana*; and another case law reported in reported in *EFR 2002(1) Sunil Vs. State of M.P.*, as also the Criminal Appeal of this Court bearing No.265/2004 (*Jeetu Maihar Vs. State of Chhattisgarh*) decided on 28.03.2014 and would submit that the I.O., and the seizure witness being one and the same, serious prejudice was caused as the entire investigation was done with animosity. It was stated that prior report was made against the police station and officers complaining that the appellant was manhandled and since pressure was created by the society by sending memos to the Superintendent of Police and other persons for that reason, false case was registered. He further submits that the contraband though was stated to be seized but was not produced in the Court during trial. He would submit that according to the case of prosecution, the contraband in its entirety was sent for FSL, but

no evidence was placed by the prosecution whether the same samples were sent for FSL.

7. He further submitted that the evidence in this case i.e., documents of Malkhana wherefrom the said goods stated to have been taken out for investigation, shows a serious variance between the quantity and the physical description of the goods as against the seizure memo were different. He stated that according to Ex.P-11 Panchnama, in all, 5 packets were sent but the FSL report (Ex.P-25) would reflect that only 3 packets reached to the FSL. Therefore, the prosecution cannot escape from its duty to explain those unexplained facts which remain on the face of it. He relied on the case laws reported in **2004 (1) EFR 22 : 2004 (10) SCC 562 - Jitendra and another Vs. State of M.P.**; [**2008 (2) EFR 707] - Noor Aga Vs. state of Punjab**; **2009 (2) J LJ 148, 2013 - Laxminarayan V. State of M.P., 2013 Cr.L.R. (M.P) 12 - Raju @ Jitendra Vs. State of Madhya Pradesh & 2011 (3) EFR 212 - Amar Singh Vs. State of M.P., through P.S. Suwasra, Distt. Mandsaur** and would submit that in all the series of the cases, the principle has been laid down that if the investigating officer and seizure is made by one person then it would cause serious flaw in case of prosecution. It was further contended that the contraband has not been produced before the Court then it causes serious dent to the case of prosecution. He further submits that according to section 52-A, the requirement was mandatory and in absence thereof the conviction cannot be allowed to stand. He further submits that according to Ex.P-1 which was sent by S.P., the contraband sent to the FSL would show that it was sent on 08.08.1997 and according to P.W.1, Kala Ram the carrier of such packet, it was in white packet of cloth but the SP had written it to be in polythene. Further when it was deposited with FSL, the physical sets of



the packets and signed papers as stated by Investigating Officer were not found. As such he contended that the goods which were seized and the goods which were sent to FSL were different as the packets changed hands.

8. Learned counsel for the appellant further contended that in this case I.O., P.W.7 has stated that during investigation he has recorded the statement of P.W.4 Sankirtan Barik but Sankirtan who was examined as PW4 had denied any such statements were recorded, therefore, he would submit that the entire investigation and recording of statements u/s 161 CrPC will prove that false averments and statements have been recorded, which vitiates the entire trial as the seizure was made by the same Police Officer who investigated the offence. Lastly it is submitted that the evidence has come on record that the house from-where the goods were seized was in joint possession of the persons, therefore, it cannot be said that the appellant was in exclusive and conscious possession of the contraband goods. Under aforesaid submission it was prayed that the judgment and conviction may be set-aside.
9. Per contra, learned State Counsel opposes these arguments. He would submit that in absence of any evidence or suggestion to the fact that the I.O., was holding bias or animosity, the evidence which is placed before the Court by the I.O. (P.W.7) cannot be negated. Referring to section 35 of the NDPS Act, he would submit that it is the presumption of culpable mental state was that of the appellant and as such once it was established by the prosecution that the contrabands were kept in the house of the appellant, then it was the duty of the appellant to negate such presumption by effective cross examination and evidence. He, therefore, submitted that the order of the court below is well merited

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which do not call for any interference. He further submits that even if the *Panchnama* witnesses have not supported the case then it cannot be said that the entire evidence cannot be looked into. On these grounds, the learned State Counsel submits that the impugned judgment/order is well merited which do not call for interference.

10. I have heard learned counsel for the parties at length and have also perused the records of the court below.
11. It is not in dispute that the Investigating Officer (P.W.-7) himself had affected the search. The mukhbir panchnama of initial information received was proved as Ex.P/3, which records a time on 06.08.1998 at about 15.30. The mukhbir panchnama records that information was received that the appellant Jaggumal Kukreja, resident of Nagar Nigam Colony, Near Water Tank, House No.43 has kept intoxicant for sale. It did not record the fact of brown sugar. Further reading of statement of Investigating Officer (P.W.-7) at Para-3 states that Rojnamcha Sanha to this effect was recorded in the Ex.P/19. Thereafter, the matter was reported to the higher officer, which was also recorded in Ex.P/17 and subsequent to that since there was no time to obtain warrant, therefore, as per Ex.P/19, copy Ex.P/19C, the officer went alongwith staffs for search. In para-16 this witness has stated that after writing mukhbir panchnama, he went to the spot with T.I. Of Police Station Ganj, SHO Urla Satendra Pandey, Crime Squad Kadir Khan and the other staff of the police station, which included Sankirtan Barik, Head Constable and other persons.
12. The said Sankirtan Barik was examined as P.W.-4, who was said to be part of raid team and was also Malkhana incharge of police station. This witness was confronted with his statement recorded by the Investigating

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Officer U/s. 161 of Cr.P.C., which was marked as Ex.D/1. The Ex.D/1 was the statement recorded by the Investigating Officer, wherein he had corroborated the fact that he alongwith Investigating Officer had went to raid the house of appellant for seizure of brown sugar and remained in such proceeding of search and seizure up till end. The said witness contrary to it in court statement stated that he only discharged the job of malkhana incharge. In the cross examination the witness has confined his act only up to receive of goods as malkhana incharge and not more. The witness has further stated that on the date of incident he had not been to the spot and no statement of the witness was recorded by the Investigating Officer. The Investigating Officer on the contrary has stated in the team of raid P.W. 4, Sankirtan Barik was present and his statement was also recorded. Thereby, the impartiality and bias of the Investigating Officer on whose statement, the entire prosecution case is based, creates a doubt.

13. The Supreme Court in the case of ***Megha Singh Vs. State of Haryana, reported in AIR (SC) 2339*** सत्यमेव जयते has deprecated the practice by stating that when the Investigating Officer and the seizure are one and same, which leads to it may not be sacrosanct. The same proposition was followed by ***High Court of M.P. in case of Sunil Vs. State of M.P., reported in EFR 2002 (1), Page No.615***, wherein the Court reiterated the stand of the Supreme Court, wherein the practice of Investigating Officer, being the complainant who seized the contraband has not been appreciated. It is also a fact that the conviction can be made only on the statement of the Investigating Officer in case of narcotics but if on appreciation of statement if this fact comes to fore that there exists series of infirmity and the serious contradictions and omissions comes out then certainly the Court has to be very much careful while examining such statement.

In the instant case the Investigating Officer of the case had stated to have recorded the statement of one of the police officer, who was said to be present on the date of raid but the said police officer has denied those facts. Therefore, in given circumstances it would be extremely dangerous to rely solely on the statement of the Investigating Officer alone.

14. Further the panch witnesses in this case are Pawan Singh Thakur (P.W.-5), and Deepak Singh Thakur (P.W.-6). These independent witnesses have not supported the seizure, therefore, the only evidence remains is to examine the statement of Investigating Officer (P.W.-7). According to the P.W.-7, the Investigating Officer, before the seizure, Taul Panchnama was prepared by Ex.P/11. According the witness after search, the brown sugar was found below the cushion in the drawing room in two plastic bags. Thereafter on primary inspection, the Investigating Officer stated that it appears to be brown sugar. Ex.P/11 reads that two brown sugar packets were found, one was of 104 grams, which was kept in white polythene, white polythene was kept in yellow polythene so there were two packets. Similarly another brown sugar of 103 grams was kept in a white polythene, which was rapped in another yellow polythene and further it was in white polythene, so there was three packets. Therefore, total one brown sugar 104 grams was in two packets and another brown sugar 103 grams was in three packets. P.W.-7 has further stated that both the packets were rolled in a white paper and was closed and thereafter were kept in the paper packet. In the paper packet one paper was placed with the signature of the appellant/accused, witnesses and that of the Investigating Officer. Thereafter all of the packets were sealed and seizure was made as per Ex.P/12.

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15. The seizure was sent to FSL by Ex.P/1, through a letter of Superintendent of Police dated 08.08.1997 by Kalaram Khute (P.W.-1). According to the statement of P.W.-1, the sealed packet was of cloth and was sent to FSL by memo dated 08.08.1997. The document Ex.P/1 states that 207 grams of brown sugar was sent, which was sealed in polythene packet, but in cross examination, the packets were said to be of cloth.
16. Now if we again refer to the statement of Investigating Officer, the Investigating Officer has stated that the polythene packets were further placed in a paper packet alongwith a paper which were signed with the signature of the appellant/accused, witnesses as also the Investigating Officer. It was stated thereafter it was sealed alongwith such signed paper placed within paper packet. But the Ex.P/1, reveals that the packets were sent in a polythene bag instead of paper bag.
17. The same packets were deposited on 09.08.1997 with the FSL. Now if we look to the statement of P.W.-4, Sankirtan Barik, Malkahana Incharge, this witness ^{सहाय्यक न्यायिक} has stated that on 09.08.1997, Kalaram Khute, Constable had obtained the sealed packet to sent it for FSL, whereas the document Ex.P/1 shows that it was sent on 08.08.1997. The document Ex.P/5C the copy of malkhana register also shows that the packets were received on 09.08.1997. On close scrutiny of document Ex.P/5C shows that over righting was made at the serial number of serial -21, which was the relevant serial number of this case. So the necessary inference and the doubts comes as to which was the packet which was deposited to FSL for test. Necessarily it creates the doubt as the number of packets also changed and the FSL report Ex.P/25 reads that one packet which contained in two yellow polythene packets which

was further containing a white polythene was deposited. The said deposit memo do not speak of a fact of any paper packet as also the contents of it containing signed papers of 3 persons. The prosecution should have been cautious while handling the alleged contraband packet and it should have been of same description after the seizure were made and sealed. If the nature of packet changed while reaching to FSL, then in such course it will create a serious lacuna in case of prosecution for which the benefit of doubt should lean in favour of accused.

18. Alongwith such infirmity with respect to sealed contraband packets, it was not produced at the time of evidence before the Trial Court. The **Supreme Court in case of Noor Aga Vs. State of Punjab and another, reported in (2008) 16 SCC 417** at para - 92 has laid down that omission on the part of the prosecution to produce the contraband at the time of evidence before the Court seriously dents the case of prosecution. In the case of **Laxminarayan Vs. State of M.P. reported in 2009 (2) J LJ 148** the Court has further observed that it was the duty of the prosecution to establish by cogent evidence that the alleged quantity of contraband was seized from the possession of the accused. The Court further in matter of **Jitendra and another Vs. State of M.P. (2004 (2) Vidhi Bhasvar 30-2004 (1) EFR. p.22 equivalent to {(2004) 10 SCC 562}** reiterated the interpretation made by the Supreme Court that when the contraband has not been produced in the Court, mere oral evidence as to their features and production of panchanama does not discharge the heavy burden, which lies on the prosecution, particularly when the offence is punishable with a stringent sentence under the NDPS Act. According to the law laid down the production of the samples were required to be produced before the Court at the time

of evidence by the prosecution, which has not done in the instant case. Therefore, the said existing facts also damages the prosecution.

19. In this case according to the evidence lead by the prosecution, one more infirmity existed. The prosecution witness P.W.-7 has stated that the house where from contraband were recovered was a residential houses of the appellant. The witness in cross-examination has not stated the fact that appellant was in exclusive possession of house as he had not visited the house inside. D.W.-2, Bhupendra Singh Gadewal, in this regard has stated that in the house where from contraband were seized other also used to reside. No document was placed by the prosecution to prove the fact that the house was in the exclusive possession of the appellant. The appellant in his statement U/s.313 of Cr.P.C. had stated that the appellant was living alongwith other family members alongwith his mother, wife, four sons.

20. The Hon'ble Supreme Court in case of **Mohd. Alam Khan Vs. Narcotics Control Bureau and another, AIR 1996 SC 3033**, has held that in order to fasten ^{सम्बन्धित ज़म्मेदारी} the criminal liability, the ownership and possession of the premises should have been proved. When the recovery is made from the premises, the Hon'ble Supreme Court has laid down the analogy that the prosecution has to prove that the accused has to be the owner and is in actual possession of the said building. Further, the Hon'ble Supreme Court in case of **Ram Singh Vs. Central Bureau of Narcotics (2011) 11 SCC 347** has held in Paras 24 & 25 as under :-

24. It is trite that to hold a person guilty, possession has to be conscious control over the goods is one of the tests to ascertain conscious possession so also the title. Once an article is found in possession of an

accused, it could be presumed that he was in conscious possession. Possession is a polymorphous term which carries different meaning in different context and circumstances and, therefore, it is difficult to lay down a completely logical and precise definition uniformly applicable to all situations with reference to all the statutes. A servant of a hotel, in our opinion, can not be said to be in a possession of contraband belonging to his master unless it is proved that it was left in his custody over which he had absolute control.

25. Applying the aforesaid principle when we consider the facts of the present case it is difficult to hold that opium was in possession of the appellant. There is no evidence on record to suggest that the appellant was in occupation of the room from where opium was recovered. Further the evidence clearly points out that title to the opium vested in the owners of the hotel. The confession given by the appellant was only that he was servant of the owners of the hotel from where the opium was recovered. In the face of the state of evidence it is difficult to hold that the appellant was in conscious possession of the opium. Section 18 of the Act prescribes punishment for possession and ~~that possession~~ ^{समय के तहत}, in our opinion, has to be conscious. In the facts of the present case it is difficult to hold that the appellant was in possession of the opium and therefore, his conviction and sentence can not be sustained."

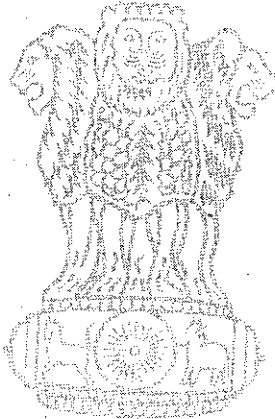
21. Taking into totality of the matter and after reading the entire statements together, it appears that the prosecution has failed to prove the involvement of the appellant in commission of offence beyond reasonable doubt. Certain lacuna existed which remained unexplained and creates a doubt about the commission of crime. Taking into totality of the case and after examination of the evidence placed by the prosecution I am of the opinion that the conviction passed by the Court

below can not be sustained and for the lacuna existed, the benefit of doubt should have been leaned in favour of the appellant. Accordingly I am of the opinion the order of conviction can not be allowed to stand.

22. For the foregoing reasons, the judgment of conviction and order of sentence passed by the learned Court below is set-aside. The appeal is allowed. If the appellant is on bail, his bail bonds shall continue for a period of six months subject to the provisions of Section 437 Cr.P.C.

Sd/-
Goutam Bhaduri
Judge

Rao/balram



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