

**THE HON'BLE SRI JUSTICE M.S.K.JAISWAL**

**CRIMINAL REVISION CASE No.541 of 2008**

**ORDER:**

This Criminal Revision Case is directed against the judgment in CrI.A.No.152/2006, dated 31.03.2008 on the file of the IV Additional Sessions Judge, Kadapa, by and under which, the conviction and sentence as imposed by the trial Court was confirmed.

2. Heard the learned counsel appearing for the revision petitioners and the learned Additional Public Prosecutor, representing the State.

3. The case of the prosecution in brief is that on 15.02.2002 on credible information that some people were carrying explosives without having any licence, at about 7.30 a.m PW3-the Inspector of Police, Pulivendla and PW 4-Sub-Inspector of Police, Pulivendla along with staff and Panch witness i.e., PWs 1 & 2 proceeded to Saptagiri Lodge, Pulivendla town, and on seeing them, A1 to A3, who stood behind the Ambassador Car bearing No.AAX-9075 tried to run away, then the police surrounded them and caught hold of them near Saptagiri Lodge. When they were questioned, A1 to A3 stated that they were doing business in explosives, and on their confession, the police opened the dickey of the Car and found 3000 gelatin sticks, 3000 electrical detonators and 3500 special ordinary detonators in two gunny bags. A1 and A2 stated that they purchased the said explosives from a licenced holder and picked up A3 from Kadapa and came to Pulivendula, and they are selling the said explosives for higher price to the customers being brought by A3. A1 & A2 also disclosed that they gave 3000 gelatin sticks and 2000 electrical detonators to A4 at Vanipenta village. It is revealed that the accused without having any licence, purchasing, transporting and selling the explosives. They seized the property under cover of Panchanama.

The Sub-Inspector of Police registered a case in Cr.No.17/2002 against A1 to A4 under Section 9(B)(1)(b) of Explosives Act. After following due procedure and after completion of investigation the police concerned filed charge sheet.

4. The trial Court had taken the case on file for the offence alleged against the petitioners/accused, and on appearance of the accused, they were examined under Sec.239 Cr.P.C and the charge under Section 9(B)(1)(b) of Explosives Act has been framed, for which, the accused pleaded not guilty and claimed to be tried.

5. To bring home the guilt of the petitioners/accused, the prosecution examined PWs 1 to 5 and got marked Exs.P1 to P8 and M.O.1 on its behalf. After closure of the prosecution evidence, the petitioners/accused were examined under Section 313 Cr.P.C putting all incriminating material available against them, but the petitioners/accused denied the material evidence. No defence is produced.

6. On appreciation of oral and documentary evidence, the learned Judicial Magistrate of 1<sup>st</sup> class, Pulivendla found the petitioners/accused guilty of the offence under section 9(B)(1)(b) of Explosives Act, convicted and sentenced them to undergo simple imprisonment for a period of two years each and also to pay a fine of Rs.3,000/- each, in default, to suffer simple imprisonment for a period of six months each.

7. The petitioners/accused challenged the conviction and sentence passed by the trial Court in CrI.A.152/2006. The criminal appeal was dismissed confirming the judgment of the trial Court. Aggrieved by the same, the petitioners/accused filed the present criminal revision case.

8. The point that arises for consideration in this revision is whether the conviction and sentence imposed by the Courts below against the revision petitioners/A1 to A4 is sustainable, or whether it

needs interference.

9. The case of prosecution in brief is that on 15-02-2002 at about 07.00 a.m., on reliable information they went to a spot near Saptagiri Lodge, Pulivendula and found an ambassador car bearing No.AAX/9075 and three persons were standing nearby. On seeing the police party, those three persons tried to escape from there but they were caught and brought near the car and when questioned, they said that they were transporting certain explosive substances and seeing the police, they tried to escape from there. On interrogation, they gave their names and they are A.1 to A.3 herein. The C.I. of Police (PW.3), the S.I. of Police (PW.4), a police constable (PW.5) and two independent panch witnesses (PWs.1 and 2) were present at that time. The dickey of the car was opened and found that they contain certain cardboard boxes and gunny bags and on opening, they found that there were 3,000 gelatine sticks, 2,000 electric detonators and 3,500 special ordinary detonators. The C.I. of Police (PW.3) recorded a panchanama in the presence of the panch witnesses and from out of the explosives available in the car, he has drawn two samples each of the gelatine sticks, electric detonators and special ordinary detonators, sealed them, affixed the labels and effected the arrest of A.1 to A.3. It is the further case that A.1 to A.3 have confessed that they purchased the explosives from Hyderabad and were transporting for selling at higher prices. They are also alleged to have confessed that they gave certain explosives to A.4 and the three accused led the raiding party along with panch witnesses to Vanipanta village of Mydukur Mandal from where they went to the house of A.4 and recovered 3,000 gelatine sticks and 2,000 electrical detonators. The same were seized and here also the C.I. of Police has drawn two samples each of the gelatine sticks and electric detonators, sealed them, affixed the labels and arrested A.4. All the proceedings were reduced into writing by way of panchanama, which was attested by the two panch witnesses namely PWs.1 and 2.

10. The further case of the prosecution is that on the next day i.e., on 16-02-2002, A.1 to A.4 were produced before the jurisdictional Magistrate along with the case property and for want of safety, the learned Magistrate directed the case property be kept in the explosives magazine of one Y.S.Pratap Reddy.

11. Five days thereafter i.e., on 21-02-2002, the Investigating Officer (PW.3) addressed a letter to the jurisdictional Magistrate to send the samples to the Director, Forensic Science Laboratory at Hyderabad, for analysis. He also filed letter of advice, which is Ex.P.6. On the same day i.e., on 21-02-2002, the Magistrate addressed a letter to the Director of Explosive Substance, Hyderabad, affixing his seal and also with a specimen seal requesting the samples to be analyzed.

12. However, on the same day i.e., on 21-02-2002, itself the Investigating Officer (PW.3) made another requisition to the learned Magistrate seeking permission to defuse the explosives in view of the safety stating that the Deputy Chief Controller of Explosives from Hyderabad has arrived to Pulivendula for the said purpose. It is noticed from the record that even though such a permission was sought for, no permission was given to defuse the explosives at Pulivendula. What is borne out from the record is that the Controller of Explosives by name C.P.Chari having reached Pulivendula P.S., on 21-02-2002 has examined the contraband and gave opinion that each of the cylindrical paper cartridges mentioned against Exhibit-1 was Bel Gelatine-80, an explosive of Class 3, division-1; each of the shining metallic capsules mentioned against exhibit-2 was an Aluminium Electric Detonator; and each of the shining metallic capsules mentioned against exhibit-3 was an Aluminium Ordinary Detonator explosives of class 6 division-3 as defined under Schedule-I of the Explosive Rules, 1983. The Controller of Explosives has submitted a report to that effect to the Judicial Magistrate of First Class further

stating that a licence is obligatory for manufacture, possession, sale, use etc., of Bel Gelatine-80 and Aluminium Electric and Ordinary Detonators as required under Rules 87 and 113 of the Rules, and that the explosives after examination were destroyed by him during his visit to Pulivendula P.S., on 21-02-2002, in the interest of public safety.

13. Similar exercise was done in respect of the other explosives seized and Ex.P.8 is the report.

14. The petitioners/A.1 to A.4 are charged with an offence which is punishable under Section 9-B (1)(b) of the Explosives Act, 1884, which reads as under:-

**9-B. Punishment of certain offences:-**

(1) Whoever, in contravention of Rules made under Section 5 or of the conditions of a licence granted under the said Rules-

(a) ... ..

(b) possesses, uses, sells or transports any explosive shall be punishable with imprisonment for a term which may extend to two years, or with fine which may extend to three thousand rupees, or with both; and

(c) ... ..

15. It is apparent that possession of such of the explosive substances is not an offence provided the same is possessed or transported with due licence. The accused are said to have purchased the explosives from Hyderabad from a licence-holder and were taking into the village for sale at higher prices. Since they were not the licence-holders, either to possess, transport or sell the explosives, they are alleged to have committed the offence.

16. The prosecution in order to prove its case has examined PWs.1 to 5 and marked Exs.P.1 to P.8 and M.O.1 – the damaged Ambassador Car. PWs.1 and 2 are said to be the independent panch witnesses in whose presence A.1 to A.3 made the confession and the explosives were seized in their presence. Both of them turned hostile

and categorically denied that any such thing happened in their presence and it is their case that they were made to sign on some written papers in the police station. Then remains the evidence of PWs.3 and 4, who are the C.I. of Police and S.I. of Police. It is not that their uncorroborated testimony cannot be made the basis for determining the guilt or otherwise of the accused but their evidence has to be scrutinized with utmost care and caution in the absence of independent corroboration. The learned Magistrate has found the accused guilty of the offence and convicted and sentenced them as stated supra, which was confirmed in appeal.

17. Learned Counsel appearing for the petitioners vehemently submits that both the Courts below have erred in finding the accused guilty in the absence of any material evidence. It is submitted that the investigating agency has failed to produce the explosives that were seized rightly from the possession of the accused before the Court. It is admitted by the Investigating Officers that the explosives that were seized were defused by the Deputy Chief Controller of Explosives at Pulivendula itself on 21-02-2002 and the remnants thereof have neither been preserved nor produced before the Court during the course of trial. There is sufficient force in the submission made by the learned Counsel appearing for the petitioner. When any contraband is said to have been seized from the possession of the accused, it is obligatory on the part of the investigating agency to produce the same in as best condition as possible so as to establish the nexus between the contraband seized and the accused. In the instant case, even though the explosive substances were said to be a threat for preservation, the Deputy Chief Controller of Explosives has gone to Pulivendula and destroyed them there. Remnants were supposed to be retained and produced before the Court. That has not been done. The best person to speak about these aspects is the Expert who is not examined.

18. Further more, as stated above, learned Magistrate has sent a requisition together with the samples drawn by the Investigating Officer, duly sealed, labelled by putting the seal of the Magistrate as well to the Controller of Explosives at Hyderabad, for examination and analysis. Strangely, this letter of advice from the Court was addressed on 21-02-2002, but on the same day, the Deputy Chief Controller of Explosives by name C.P.Chari is said to have visited Pulivendula, examined the contraband seized at the Police Station, prepared the reports –Exs.P.7 and P.8, and destroyed the explosives. In my opinion, that was not what was required of an independent agency such as Controller of Explosive Substances. They are required to analyse the samples sent after verifying the specimen seals and on being satisfied that nothing has been tampered with, an Expert is supposed to examine the produce and give his opinion as to whether it is an explosive substance or not. Strangely, the Controller of Explosives has visited Police Station and what appears is that he has examined the remaining explosives kept in the Police Station and destroyed the same. It is not known as to whether the explosives were analysed with the help of any scientific instrument. The samples are required to be examined and analysed in laboratory but not in the Police Station. However, whether that is permissible or not could have been brought on record if the Controller of Explosive Substances has been examined before the Court. Sri C.P.Chary, Controller of Explosive Substances has been listed as a witness in the charge-sheet, but he has been given up by the prosecution. Had he been examined, as a witness, everything would have come out as to whether what was the reason for him to go over to Pulivendula, examine the explosives, prepare a report there, destroy the explosives, and submit the report to the Court. He could have even thrown light on the aspect as to whether he has examined the samples drawn by the Investigating Officer, which were duly sent to the Forensic Science

Laboratory at Hyderabad, with letter of the jurisdictional Magistrate. The prosecution, for the reasons best known, has not only got the above exercise done in a suspicious manner but has also given up the most material witness for the prosecution namely Sri C.P.Chari, the Controller of Explosive Substances, who is said to have examined the samples and submitted the report – Exs.P.7 and P.8.

19. The effect of the above is that there was absolutely no evidence, whatsoever, before the Court so as to connect the accused with the explosive substances said to have been seized from their possession and as to whether what kind of explosives they were.

20. The specific case of the Police Officers is that the explosive substances were destroyed without preserving even the remnants due to public safety. It may be recalled that the explosives were seized on the afternoon of 15-02-2002 and were kept in the Explosives Magazine of one Y.S.Pratap Reddy. When that facility is available, what prevented the investigating agency to preserve the explosives either after making them dis-functional or otherwise is not explained. This material lapse on the part of the prosecution is certainly fatal to the case of the prosecution. In a similar type of case namely the one under the NDPS Act, there is one authority of the Supreme Court -

**VIJAY JAIN v. STATE OF M.P.**<sup>[1]</sup>, which has been relied upon by the learned Counsel appearing for the petitioners. It was a case where brown sugar was involved. The case was that the said contraband was seized from the possession of the accused. In that case also, the case property was not deposited. The Supreme Court has referred to a decision reported in **NOOR AGA v. STATE OF PUNJAB**<sup>[2]</sup>, wherein it was observed that physical evidence relating to three samples taken from the bulk amount of heroin was also not produced, even if it is accepted for the sake of argument that the bulk quantity was destroyed, the samples were essential to be produced and proved as primary evidence for the purpose of establishing the fact of recovery

of heroin as envisaged under Section 52-A of the Act. The Supreme Court also referred to the Judgment reported in **JITENDRA v. STATE OF M.P.**<sup>[3]</sup>, wherein it was held that for an offence under the NDPS Act, it was necessary for the prosecution to establish by cogent evidence that the alleged quantities of the contraband goods were seized from the possession of the accused and the best evidence to prove this fact is to produce during the trial, the seized materials as material objects and where the contraband materials alleged to have been seized are not produced and there is no explanation for the failure to produce the contraband materials by the prosecution, mere oral evidence that the materials were seized from the accused would not be sufficient to make out an offence under the NDPS Act particularly when the panch witnesses have turned hostile.

21. Similar observations were made by the Supreme Court in another decision reported in **ASHOK v. STATE OF M.P.**<sup>[4]</sup>, wherein also it is observed that in the absence of the material seized and in the absence of any explanation for non-production, there cannot be any evidence to connect the forensic report with the substance that was seized from the possession of the appellant. After referring to the above authorities, the Supreme Court in **Vijay Jain's case (referred 1 supra)**, in para 12 observed as under:-

“We are thus of the view that as the prosecution has not produced the brown sugar before the Court and has also not offered any explanation for non-production of the brown sugar alleged to have been seized from the appellants and as the evidence of the witnesses (PW.2 and PW.3) to the seizure of the materials does not establish the seizure of the brown sugar from the possession of the appellants, the Judgment of the trial Court convicting the appellants and the Judgment of the High Court maintaining the conviction are not sustainable.”

The above observations of the Supreme Court are squarely applicable

to the facts of the instant case even though that was a case under the NDPS Act and the present case is under the Explosive Substances Act. The analogy is similar. The Supreme Court in the above authorities has clearly observed that even if the entire material cannot be produced at least the samples so seized should be produced and proved as primary evidence during trial. The Supreme Court also held that due to the non-production of the primary evidence, the prosecution cannot connect the forensic report with the substance.

22. In the instant case also, even at the cost of repetition, it may be stated that according to the investigating agency, thousands of gelatine sticks, electrical detonators and special ordinary detonators were seized from the possession of the accused. They are said to have been produced before the Court which directed its safe preservation with an Explosive Magazine. Samples were drawn and through Court, they were sent to the Forensic Science Laboratory at Hyderabad. The Controller of the Explosive Substances, for unexplained reasons, reached Pulivendula and instead of examining the samples drawn, sealed and sent by the Court, has examined the entire stock and after opining that they are the explosive substances, destroyed them then and there even without there being any permission of the Court. Once a property has been seized and deposited in the Court, and when the Court directs its safe custody at a particular place, no authority is competent to meddle with that property without the permission of the Court. For all purposes, it is the property in the custody of the Court and any meddling with it should be only with the permission of the Court. If the Controller of Explosive Substances thought it wise to analyse the entire contraband instead of samples drawn, he ought to have taken permission from the jurisdictional Magistrate before doing that. For the unexplained reasons, which raises any amount of suspicion, the Controller of Explosive Substances has not analyzed the samples but examined the entire stock and after opining that they are the explosive substances,

destroyed the entire contraband even without retaining the samples or remnants for being produced in the Court during the course of trial. Significantly, it may be stated that the ambassador care which is not even in a working condition, which was also produced before the Magistrate along with the explosives on 16-02-2002 and was directed to be kept in the safe custody of the police, was produced before the Court during the course of trial and the same has been marked as M.O.1. Such a precaution was not taken in respect of the most essential aspect of recovery of the contraband. As already stated, if there was any justifiable reason for the Controller of Explosive Substances to examine the entire contraband, without analysing the samples sent to it through the Court, he could have explained the same to the Court as to under what circumstances the entire contraband was destroyed without retaining even its remnants. Had he been examined in the Court as a witness, which is not done even though he is listed as a witness No.5.

23. The above aspects are not at all considered by both the Courts below in proper perspective. Since the prosecution could not establish beyond reasonable doubt that the objects that were seized from the possession of the accused were the explosive substances which have been produced before the Court and which has been certified to be an explosive substance by an expert, the benefit of doubt should invariably go to the accused. Both the Courts below have committed serious illegality in not appreciating this material aspect. Therefore, the Judgments cannot be sustained. They are liable to be set aside.

24. For the reasons stated above, the Criminal Revision Case is allowed. Consequently, the judgment of the appellate Court dated 31.03.2008 in CrI.A.No.152 of 2006 as well as the judgment of the trial Court dated 04.10.2006 in C.C.No.161 of 2002 are set aside and the petitioners/A1 to A4 are acquitted of the offence for which they found

guilty and convicted. The bail bonds of the petitioners/A1 to A4 shall stand cancelled. The fine amount, if any paid, shall be refunded to the petitioners/A1 to A4.

Pending miscellaneous applications, if any, shall stand closed in consequence.

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**M.S.K.JAISWAL,J**

Date: 19.01.2016

Dsr/Smr

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[\[1\]](#) (2013) 14 SCC 527

[\[2\]](#) (2008) 16 SCC 417

[\[3\]](#) (2004) 10 SCC 562

[\[4\]](#) (2011) 5 SCC 123