

HON'BLE Dr. JUSTICE B.SIVA SANKARA RAO

CRIMINAL APPEAL No.1078 of 2015

JUDGMENT:

The appellants are A.1 to A.3 among the 5 accused in S.C.No.64 of 2014 on the file of learned Metropolitan Sessions Judge, Hyderabad, by judgment dated 19.10.2015 found A.4 & A.5 not guilty and further found A.1 to A.3 only guilty for the offence punishable under Section 8(c) r/w Section 20(b)(ii)(c) of Narcotic Drugs and Psychotropic Substances Act (for short 'NDPS Act') and convicted under Section 235 (2) Cr.P.C. by sentencing to undergo rigorous imprisonment for a period of 10 years each and further to pay a fine of Rs.1,00,000/- each with default sentence of six months rigorous imprisonment for the said offence by giving set off for the period of remand.

It is aggrieved thereby, the present appeal is maintained with the contentions in the grounds of appeal that the conviction judgment so far as appellants/A.1 to A.3 by the learned trial Judge supra is against the settled principles and erroneous outcome and in the failure to appreciate the material on record and in ignorance of the non-compliance with the mandatory provisions of Sections 42 & 50 of NDPS Act and also failed to consider the delay in sending the samples to the laboratory and the ceiling procedure and should have seen that the accused could not be convicted at least by letting of on benefit of doubt and more particularly

from the fact that there are no chits on the contraband allegedly seized to say the same contraband and the punch witness-PW.1 did not even support the prosecution case and thereby sought for setting aside the conviction judgment and to allow the appeal acquitting the accused.

Learned counsel for the appellants in the course of hearing reiterated the same and placed reliance on the two Judge Bench expression of the Apex Court in **Ashok Alias Dangra Jaiswal Vs. State of Madhya Pradesh**¹ particularly from Paras 10 to 13 which referred and relied earlier expression in **Jitendra Vs. State of M.P.**².

The learned Public Prosecutor representing the State supported the conviction judgment of the trial Court as reasoned one and outcome of the judicial appreciation and there is nothing to interfere either with the conviction judgment or with the quantum of sentence in seeking to dismiss the appeal.

Heard both sides at length and perused the material on record.

The case of the prosecution before the trial Court as per the charge sheet in nutshell was that on 27.02.2012, the Prohibition and Excise Inspector, Enforcement Wing, Hyderabad-PW.2 received information about illegal possession and sale of dry ganja at house No.9-1-92, Kalidaspura, Langer House, Hyderabad, and he along with his staff went

¹ (2011) 5 SCC 123

² (2004) 10 SCC 562

there and at about 02.30 PM and secured the 2 punch witnesses including PW.1-O.Srinivas and went to the third floor of the building where found accused Nos.1 to 3, who are the appellants herein and they informed them about they are excise officials and they came to search about any illegal possession of ganja and as to whether they can be searched in the presence of the Gazetted officer or the Magistrate and PW.3 present there is the gazetted officer and they accepted for the search before the gazetted officer and search memo was served on the accused and found dry ganja in the bags containing 10 kgs or 15 kgs or 14 kgs or 12 kgs or 4 kgs respectively totalling of 110 kgs in 9 bags and 10th bag containing 238 sachets, each about 15 grams of dry ganja totalling 3.57 kgs to say total 113.570 kgs and when questioned they disclosed about their father and elder brother A.4 & A.5 instructed them that one Yellaiah brings the same from Warangal by bus in small quantities and supplies to their house and they stored the same in their said room i.e., 3rd floor which belongs to their grandmother Sajju bai and the 3rd floor is in the name of their father-A.4. The same was seized after collecting 2 samples from each bag duly sealed and packed under cover of panchanama and search proceedings containing signatures of PW.1 i.e., Exs.P1 to P6 and the Prohibition and Excise Inspector, Golkonda-PW.4 Muralidhar, registered the crime No.233/2011-12 for the offences supra after investigation and received the chemical

analysis report confirming the contraband as ganja filed the charge sheet and the sale deed for the house bearing No.9-1-92 obtained from the Joint Sub-Registrar also produced. It is therefrom the learned Special Judge taken cognizance for the offences supra against the 5 accused and secured their presence and on supply of copies framed the charges and conducted trial from the plea of the accused not guilty.

During the course of trial, besides PWs.1 to 4 referred supra one of the punch witnesses the Enforcement Officer, Investigation Officials with reference to Exs.P1 to P6 supra and Section 42 of NDPS Act intimation to the superior under Ex.P7, search proceedings-Ex.P8, panchanama-Ex.P9 and intimation to superior under Section 57 of NDPS Act-Ex.P10, the crime occurrence report-Ex.P11, translated copy of sale deed-Ex.P12 with certified copy of gift deed-Ex.P13 and analysis report-Ex.P14. In the course of defence, DW.1-Anand Singh was examined as defence witness and Ex.D1 ration card of DW.1 was exhibited. MO-1 is 10 bags of ganja covering contraband and MO-2 10 samples packets of ganja. It is from said evidence after hearing in answering the points formulated as to identity of the accused, scene of offence and as to whether prosecution proved the case beyond reasonable doubt with what result. It is observed in the course of discussion of evidence, among PWs.1 to 5, even PW.1 turned hostile, PWs.2 & 3 who participated in the ride of whom PW.2 received information about the contraband stored at the

house No.9-1-92 and PW.3 the Gazetted officer secured by PW.2 for the search conducted by him in the premises for the seizure of the contraband covered by the panchanama about collection of samples and apprehension of A.1 to A.3. The evidence of PWs.2 & 3 is that when they went to the spot found A.1 to A.3 in the premises whereas PW.3 deposed that 3 persons came out not by stating A.1 to A.3 but identifying two of them as if A.3 and A.5. Though it is the prosecution case of A.5 was not present from what PW.3 stated is he could not say A.3 and A.5 are culprits with certainty from lapse of several years after the said proceeding. The evidence shows it is door No.9-1-92, Kalidaspura, Ex.P13 is the gift settlement deed in favour of Gajanand Singh executed by his mother Sarju Bai. The ration card when confronted to PW.2 in saying the house number therein is 9-1-224/A/1/22 and what PW.2 deposed in explaining the same is what was found the material was in the house No.9-1-92 and what DW.1 deposed is that he is the owner of the house No.9-1-92, whereas Ex.P13 supra stands in the name of Gajanand Singh who is one of the four brothers of DW.1 including A.4, but for saying orally of A.4 has no share in the house or he resides at Laxmi Nagar. What DW.1 stated is excise officials never came to their house No.9-1-92 refers in the ration card as that of DW.1. The panchanama shows it disclosed by A.1 to A.3 of their father and their elder brother (A.4 & A.5) securing from Yellaiah of Warangal, who was bringing the ganja by bus in

small quantities and it shows A.1 to A.3 are participating in sale of ganja and even confession of co-accused is weak evidence and therefrom benefit of doubt comes to A.4 and A.5. Once panchanama signed by A.1 to A.3 and the contents support the evidence on record even PW.3 failed to identify A.1 and A.2 the contemporaneous proceedings of disclosure and seizure to be given sanctity. There is compliance with the mandatory provisions of the Act and compliance of Section 50 of the Act does not arise for no personal search and PW.4 categorically deposed of chits affixed on MO1 have been lost during transit. PW.5 also deposed the same and once the FSL report shows the seals were intact or the samples that confirms about the contraband is ganja and delay in sending the samples to the laboratory after its seizure no way fatal thereby found A.1 to A.3 guilty.

Undisputedly one of the two punch witnesses totally did not support the prosecution case in any manner and the other punch witnesses not chosen to examine by the prosecution and PW.3 is the gazetted officer present during the said search by PW.2 from the information as to availability of contraband at house No.9-1-92 and that house belongs to DW.1 and not that of any of the accused from Ex.D1 ration card shows that is owned by DW.1. No doubt there is basically from the panchanama and from the evidence of PW.2, A.1 to A.3 were found in the said house where they got the information about the storing of ganja and

went there and searched and found the contraband supra that was seized after serving the search memo.

It is one of the contentions of the learned counsel for the accused that A.1 to A.3 are the sons of A.4 and brothers of A.5 and if at all the house property any share got by A.4 and not by any others and from their mere presence at the house, they cannot be attributed with any conscious knowledge of the constructive possession of the contraband even. The expressions placed reliance on **Ashok supra** speaks though punch witnesses to the search and seizure turned hostile as not a uncommon phenomenon of criminal trial and the absence of other consistent evidence it is unsafe to find the appellants/accused guilty and to convict for the offence under Section 8 r/w 21 of the NDPS Act from the so called recovery of narcotic drugs substance for the other link evidence as to seizure and possession once missing to show the complicity of the accused to the crime in saying the High Court was right in saying trial Court's conviction judgment not lending benefit of doubt from what was held in **Jitendra supra** to prove the ganja recovered from possession of accused there is only evidence of police officials for punch witnesses turned hostile and there is no independent evidence as to so called recovery from possession of accused and the so called panchanama is nothing but a document written by the police officials concerned, from punch witnesses did not support the same. There the defence suggestion was at the instance of landlady

where the contraband found, the officials falsely implicated the accused persons.

Here coming to the case out of the two persons, PWs.2 & 3 remained from PW.1-punch witness turned hostile and the other punch witnesses not even examined much less with any explanation for the manner of search conducted to say in that course of search found the contraband in that house, among the said 2 official witnesses what PW.3 deposed is as if A.5 was present along with A.3 and could not even identify A.1 and A.2 and his evidence regarding panchanama and seizure only corroborates from the premises and nothing to say in the conscious possession of A.1 to A.3 for the house is not standing in their name much less of their father or elder brother (A.4 & A.5) and the trial Judge given benefit of doubt to A.4 & A.5 even from the alleged disclosure panchanama of A.1 to A.3 shows of A.4 that is collecting contraband for resale and not by A.1 to A.3, leave about the house is standing in the name of DW.1 and that is also supporting by Ex.D1 ration card and thereby there is nothing to draw the presumption of conscious possession of the contraband with A.1 to A.3 from the sole testimony of PW.2 regarding the said disclosure and seizure from the evidence of PW.3 is not even on material aspects corroborates that of PW.2, thereby the accused Nos.1 to 3 also entitled to the benefit of doubt from the said expression of the Apex Court in **Ashok supra** relied upon **Jitendra supra** and from what PW.1 deposed of not

only not supporting the prosecution case, but of nothing happened and he was asked at his shop to sign on the panchanama i.e., Exs.P1 to P6 signatures and Exs.P8 & 9 proceedings of search and panchanama and even from the Ex.P13 and P12 nothing to show the property is in the name of any of the accused and there is nothing even to show A.1 to A.3 are the residents of house in question No.9-1-92 for at least to draw the presumption of conscious possession under Section 54 of the NDPS Act with other presumption of guilty state of mind therefrom under Section 35 of the NDPS Act. Leave about mere delay in sending the samples by itself not fatal to the prosecution case if otherwise consistent.

Having regard to the above and in the result, this Criminal Appeal is allowed by lending benefit of doubt to the accused in setting aside the conviction judgment of the trial Court therefrom and bail bonds of the accused stand cancelled and they are to be set free if otherwise not required in any other case.

Miscellaneous petitions, if any, shall stand closed.

Dr. B. SIVA SANKARA RAO, J

Date: 11.07.2018
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